Office-Supreme Court, U.S.
FILED
JUN 1 1981
ALEXANDER L. STEVAS,
CLERK

80-2060

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No._____

IN THE MATTER OF JOHN D. RANDALL, SR.,

Petitioner,

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals

For the Eighth Circuit

JOHN D. RANDALL, SR.
330 1st Street SE
Cedar Rapids, Iowa 52401
PRO SE

QUESTIONS PRESENTED

The case presents three questions. One question whether an Eighth Circuit Practioner under the rules of the Eighth Circuit is entitled to have the question of his disbarment heard en banc. The second whether a lawyer is entitled to due process of law and equal protection of the law in disciplinary proceedings. Third, whether in this disciplinary proceeding the Eighth Circuit Court of Appeals and the lower Federal Courts handled this proceeding in a manner which would entitle this Petitioner to invoke Rule 17-1(a) of this Court.

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IN THE SUPREME COURT OF THE UNITED STATES

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No._____

JOHN D. RANDALL,

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PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Eighth Circuit

Petitioner John D. Randall, Sr. prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above entitled case on January 21, 1981. Petition for rehearing denied on March 3, 1981.

CITATIONS TO OPINIONS BELOW

The portion of the Opinion of the United States Court of Appeals in the Eighth Circuit, relative to the disbarment of Petitioner, Division III, is printed in the Appendix D, p. 16. The Opinion of the Supreme Court of Iowa is Appendix H, P. 135. The Finding of

Fact, Conclusions of Law, and Recommendation of the Grievance Commission of the Supreme Court of Iowa, and Exception to Finding of Fact, Conclusions of Law, and Recommendation, is Appendix G, p. 101.

JURISDICTION

The decree of the United States Court of Appeals was entered January 21, 1981. Rehearing was denied March 3, 1981. The jurisdiction of the Court is invoked under 28 U.S.C. Section 1254(1).

There is a separate ground under which this Court should take cognizance of this matter. The Petitioner was denied discovery, was denied a de novo hearing and was denied a hearing en banc as is provided by Rule 2 of the United States Court of Appeals for the Eighth Circuit and the portion of Rule 17-1(a), of the Rules of the Supreme Court of the United States reading:

> "1(a) When a Federal Court of Appeals***, has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower Court, as to call for an exercise of

this Court's power of supervision."

QUESTIONS PRESENTED

The case presents three questions. One question whether an Eighth Circuit practioner under the rules of the Eighth Circuit is entitled to have the question of his disbarment heard en banc. The second whether a lawyer is entitled to due process of lawn and equal protection of the law in disciplinary proceedings. Third, whether in this disciplinary proceeding the Eight Circuit Court of Appeals and the lower Federal Courts handled this proceeding in a manner which would entitle this Petitioner to invoke Rule 17-1(a) of this Court.

STATUTES INVOLVED

Fourteenth Amendment, United States Constitution, Section 1:

"***Nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the law***"

RULES INVOLVED

Rule 6, United States Court of Appeals Eighth Circuit:

> "Procedure for the admission, suspension, and disciplining of an attorney shall be as prescribed in Rule 46 of the Federal Rules of the Appellate Procedure.***"

Rule 46(b):

> "Suspension or disbarment. When it is shown to the Court that any member of this Bar has been suspended or disbarred from practice in any other Court of record,***he will be subject to suspension or disbarment of the Court. A member shall be afforded an opportunity to show good cause, within such time as the Court shall prescribe why he should not be suspended or disbarred.***"

Rule 46(c):

> "Disciplinary power of the Court over attorneys. A Court of Appeals may, after reasonable notice and an opportunity to show cause to the contrary, and after hearing, if requested, take any appropriate disciplinary action against any attorney who practices before it***"

Rule 2(a):

> "The Judges of this Court shall as provided in Title 28 U.S.C.A., Section 46, be assigned to sit upon the Court and its divisions of the Court direct. Cases and Controversies shall be heard and determined by a

Court or division of not more than three Judges***"(Emphasis supplied)

PROLOGUE

John D. Randall, Sr., is presenting this Petition for Writ of Certiorari Pro Se from the judgment of the Eighth Circuit Court of Appeals striking his name from the roll of attorneys licensed to practice before the Eighth Circuit. He is doing this Pro Se not because of any dissatisfaction with his Counsel, because his representation has been of the highest professional standard. However, in this Petition it will be necessary to critically examine the proceedings and comment on the Opinion. Considering the fact that the Panel of the Eighth Circuit has announced that the violation of an Ethical Consideration may subject a lawyer to disciplin at the election of the Court, it would be unfair to subject a lawyer who would expect to practice before the Eighth Circuit Court of Appeals to take a chance, that he might be displease the Court, and be subject to discipline for

the violation of one of the 138 Ethical Considerations.

STATEMENT OF THE CASE

The ethical infractions upon which the disbarment was based accurred in 1973. The cases relied on by the Courts and upon which the Courts based their judgment were handed down from 1974 to 1979.

Considering first the violation of EC 5-5 the drawing of the Will of Lovell Myers March 14, 1973. The Iowa Supreme Court had adopted the Code of Professional Conduct October 4, 1971, without minor change, without the Preamble. September, 1972, Mr. Lee Gaudineer described as "Staff Counsel Committee on Professional Ethics and Conduct, Iowa State Bar prepared an article in the Drake Law Review (September, 1972, issue) entitled "Ethics: The Grievance Commission." In that article and on page 116 Mr. Gaudineer described the difference between Ethical Considerations and Disciplinary rules, in the following language:

> "Within each Canon there were then to be statements of 'Ehical Considerations' representative of the objectives and principles a lawyer may rely upon for guidance. Lastly, within each Canon, there are statements of disciplinary rules which are mandatory."

There were no Iowa cases prior to 1973, which would in any way reflect that the preperation of a Will under the circumstances existing would havebeen unethical.

The background of the drafting of the Will would negative the thought of unethical conduct. Lovell Myers, seven years younger than Petitioner, came to Petitioner's office to persuade Petitioner to approve his telling his daughter and her husband that they should not come to Linn County to replace Morningstar, and to permit Myers to continue to employ Morningstar. Myers was a strong-willed man who could not be influenced. In order to get his way he told Petitioner to prepare a Will leaving his property to Petitioner. In 1953 Myers had had Petitioner draw a Will where Myers had left his daughter $500.00. Under

the circumstances there was no reason for Petitioner to believe that Myers and his daughter had not had another "falling out". Appendix F.

In addition, when Myers came to Petitioner's office he knew that he had wrongfully stolen from the corporation over $193,000.00, Portion of Report of Temporary Administrator Appendix J.

EC 5-5 states that the lawyer should not suggest that a gift should be made. Petitioner did not suggest to Myers that Myers make a gift to him. The language to EC 5-5 is:

> "Other than in exceptional circumstances, a lawyer should insist that an instrument in which his client desires to name him beneficially be prepared by another lawyer selected by the client." (Emphasis supplied)

The Opinion of the Panel stated that the drafting of the Will violated the Ethical Canon 5-5, Appendix D. That is not the language of the Canon and the Petitioner has at all times contended that under the

circumstances he was not obligated to insist that Myers go to another lawyer.

The Opinion of the Panel of the Eighth Circuit states:

> "In which Myers left his entire estate, conservatively valued at over two million dollars.***"

Then on page 14 the Panel uses language:

> "First, the Question of Property Involved"(Appendix D)

There is no evidence in the record which would warrant a conclusion that Myers was worth even one million dollars.

There were introduced in evidence three financial statements of the corporation. The main corporate asset was land, Myers set the valuation of the land. The Petitioner showed in his Petition for Rehearing En Banc, Appendix F, that the value of Myers interest composed mainly of stock of the closed corporation as of March 14, 1973, could not have been two million dollars in fact probably not one-half of that amount. This would be much less if the amount Myers had wrongfully taken from the corporation had

been taken into consideration. The Myers estate at the time of his death was not worth two million dollars. Exhibit W, Appendix I.

The Panel of the Circuit Court disposes of the ex post facto contentions as to EC 5-5 because the ex post facto concept is only applicable in criminal cases. While Petitioner does not agree that this is the fact, if it were to apply to this Petitioner, standards of conduct which could not fairly have been anticipated and to punish him for violating those standards would be at war with a fundemental concept of the common law that crimes must be defined with appropriate definiteness. Pierce vs. United States, 314 US 306, 311(1941). This Court should act on the premise that lawyers, like all other, are protected by the Fifth and Fourteenth Amendments against punishment except for conduct which has been defined in advance as improper and unethical or is so patently immoral that every reasonable practioner

would know it.

It is settled that penal statutes must give fair notice of what it is which is commanded or forbiden. Connally vs. General Construction Co., 269 US 385(1926); Luryetta vs. New Jersey, 306 US 451(1939); Musser vs. Utah, 333 US 95(1948).

This requirement is violated by a statute too vague on its face, and is violated also when a statute, seemingly narrow and precise, is unforeseeably and retroactively expanded by judicial construction. Boui vs. Columbia, 378 US 347, 352(1964). For almost a century it has been established that disbarring a lawyer from the practice of his profession, though done to protect the public rather than with the intent of punishing the lawyer, has the effect upon him of punishment, and that laws with such an effect must meet the tests applicable to a penal statute. Ex Parte Garland, 4 Wall. 333(1867).

This Court has referred to "the undeniably correct premise that a state may

not arbitrarily refuse a person permission to practice law***,"Cohen vs. Hurley, 366 US 117, 122, 123(1961). To disbar Petitioner would be contrary to that premise.

PETITIONER'S DISBARMENT HAS DENIED HIM DUE PROCESS OF LAW.

PETITIONER WAS ENTITLED TO CLAIM THE CONSTITUTIONAL GUARANTEES OF DUE PROCESS.

The Petitioner sought from the Supreme Court of Iowa permission to conduct discovery which would enable him to discover whether there had been consideration by the Ethics Committee either as to the charge of the violation of EC 5-5 or as to the charge of Conflict of Interest. He was denied this right. Petitioner sought the right to conduct discovery in the United States District Courts for the Northern and Southern Districts of Iowa, this was denied. The Petitioner requested the United States Circuit Court of Appeals for the Eighth Circuit to permit discovery. The Petitioner's Brief in the appeals no. 80-1254 and No.

80-1545 requested the Eighth Circuit Court to appoint a Federal Judge from outside Iowa to furnish the Petitioner a "whole and conplete hearing", this was denied.

Petitioner was further denied due process of law in that he was disbarred by a Panel of the Eighth Circuit consisting of only two sitting judges of the Eighth Circuit. This is contrary to Rule 2 of the Rules of the Court of Appeals for the Eighth Circuit, which provides cases and controversies shall be heard and determined by a Court or a division of not more than three Judges". Rule 15 of the Eighth Circuit provides for the "**disciplining of attorneys shall be as prescribed in Rule 46 of the Federal Rules of Appellate Procedure".

The Rules of Appellate Procedure 46(b) and (c) relate to action by "the court" and not to a Division of the Court. There can be no question that a hearing as to a show cause order is not a "case" or controversy referrred to in Rule 2 of the Eighth Circuit

Rules. Further the showing under a show cause order could not be a controversy, a controversy is definded in Black's Law Dictionary as, "a litigated question; adversary proceeding in a Court of law, a civil action or suit, either at law or in equity; a justiciable dispute". The show cause order and the response thereto could certainly not be a controversy as contemplated by Rule 2 of the Eighth Circuit Rules.

The Petitioner has at all times maintained that he was entitled to a hearing en banc. He requested this at the time the Eighth Circuit consolidated the appeals, this was denied. Appendix E. After the Panel handed down its judgment he petitioned Pro Se for a rehearing en banc, this was denied. Appendix F.

Petitioner has been denied due process of law by the Supreme Court of Iowa, the United States District Courts for the Northern and Southern Districts of Iowa nd by the Eighth Circuit Court of Appeals.

TO DISBAR PETITIONER ON THE GROUNDS OF CONFLICT OF INTEREST IS SO ARBITRARY, THAT BY ACTING ON THIS GROUND THE PETITIONER WAS DENIED DUE PROCESS OF LAW.

There are Constitutional limits on the generally broad control a Court has over those permitted to practice before it. It has been held that "a state may not, under the guise of prohibiting professional misconduct ignore Constitutional rights". National Association for the Advancement of Colored People v. Beiton, 371 US 415, 439 (1963):

> "A state can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualification must have a rational connection with applicant's fitness or capacity to practice law."

Schware v. Board of Bar Examiners of the State of New Mexico, 353 US 232, 239(1957). For purposes of this rule, there is no Constitutional distinction between denial of admission to the Bar and disbarment. Cohen v. Hurley, 366 US 117, 123(1961). For the

information of the Court the Petitioner has set out in Appendix B, his biographical sketch. Such limitations on states apply a fortiori to a Federal Court when it considers disbarment of one of its attorneys.

The disbarment of the Petitioner because of conflict of interest is most difficult to understand, the language used in the Opinion of the Panel of the Eighth Circuit is strange:

> "The Supreme Court of Iowa also found that Randall's representation of both his own and Myers' corporate interests in the Morningstar land title suit was a conflict of interest in violation of Iowa's Disciplinary Rules 5-101(A) and 5-104(A). The Court based this finding on Randall's suspicions concerning the forged deed involving Myers and Morningstar. We agree with the Supreme Court of Iowa that, in these circumstances, Randall was under a duty to withdraw from representation of Myers's fifty percent interest in the corporation.
>
> We therefore find that Randall's actions with regard to the will and the representation of Myers's corporate interest warrant disbarment from this Court". (Emphasis supplied)

The comment of the Court refers to the Petitioner's representation of the corporation Myers Farms, Inc. in the Morningstar case.

The Grievance Commission found as a fact that Petitioner ceased to represent Myers in October of 1975, appendix G. The Grievance Commission recommended that the Petitioner be disbarred because of his representation of Lovell Myers in the Morningstar suit at the same time he represented his personal interest and the interest of Myers Farms, Inc. This without disclosure and without excuse. That this was a conflict of interest.

The Supreme Court of Iowa apparently being conscious of the fact that until the Supreme Court of Iowa changed the law with respect to the trial of Law issues before Equitable issues(Morningstar vs. Myers 255 NW2d 159(Iowa 1977) the interest of Myers and the Petitioner were identical, appendix F. Therefore it was necessary for the Supreme Court of Iowa to find some other reason to disbar the Petitioner. This is the language:

> "We have said Randall's representation of both his own and Myers's corporate interests in the Morningstar suit was a

conflict of interest. As such it was a violation of DRs 5-101(A) and 5-104(A) interpreting EC 5-1, 5-2, and 5-3."(285 NW2d 161, 165)

This is the language adopted by the Panel of the Circuit Court. Thus the Petitioner has been disbarred from the representation of a corporate entity in which he had a fifty percent interest.

The Supreme Court of Iowa and the Panel of the Eighth Circuit Court of Appeals ignored the charge of EC 5-18; "A lawyer employed or retained by a corporation or similar entity owes his allegiance to the entity and not to a stock holder, director, officer, employee, representative, or other person connected with the entity**"

To disbar the Petitioner in the State Courts and the Eighth Circuit is an unjustified arbitrary ground, bearing no rational connection to his fitness or capacity to practice law. While it is true that a professional standard is not to be judged by lay understanding, it is also true that when

a practice from a layman's point of view, runs afoul of a professional standard the burden of justification is on the profession. It is not met by a mere reitertion of a rule." Schwartz, Group Legal Service in Perspective, 12 UCLA L. Rev. 279, 283.

At the time of the death of Myers, February 18, 1976, he was not represented by Petitioner.

The Morningstar case was pending in the Supreme Court of Iowa on an interlocutory appeal by Morningstar from a ruling by Judge Honsel of the Linn County, Iowa, District Court that the quieting title action brought by Myers and the Petitioner against Morningstar should be first tried. That was the Iowa law at that time.

The record reflects the fact that the first time Petitioner was aware that Myers had not had the permission of the Morningstars to sign the deed to the Hess farm, was December 10, 1975, when Myers admitted that he did not have permission in a deposition

taken on that day.

The Iowa State Highway Commission in late 1974, had taken the house in which Myers had lived for over thirty years and the Petitioner had financed the reconstruction and furnishing of another house for Myers. March 19, 1975, Myers wrote a letter of appreciation for what Petitioner had done. A photostatic copy of that letter is Appendix L. Even the Supreme Court of Iowa, who settled everything against Petitioner by saying that he was not truthful, would be hard put to claim that Petitioner financed a new house when he believed that Myers had defrauded him. The disbarment of Petitioner was an arbitrary act of the Court based upon the false premise that there was a conflict of interest.

THE ARBITRARY ACTION OF THE UNITED STATES DISTRICT COURTS FOR THE NORTHERN AND SOUTHERN DISTRICTS OF IOWA AND THE PANEL OF THE EIGHTH CIRCUIT IN DISBARRING THE PETITIONER WITHOUT A DE NOVO REVIEW AND WITHOUT PERMITTING DISCOVERY ENTITLES THE

PETITIONER TO REQUEST THIS COURT TO EXERCISE ITS POWER OF SUPERVISION AS IS PROVIDED BY ITS RULE 17(1)(a).

In Marbury v. Madison Cranch 137, 163, (1803) Chief Justice Marshall observed:

> "The very essence of civil Liberty certainly consists in the right of every individual to claim the protection of the laws when he receives an injury."

Frank Way a professor of political science and chairman of the that department at the University of California, Riverside, in an article in Judicare, April 1981, Issue, Vol. 64, No. 9, p. 390 at page 393, states:

> "The doctrine of absolute judicial immunity is like a fortress protecting judges in everything from good-faith errors to malicious abuse of power;

and at page 395:

> "**, the doctrine of unqualified immunity of judges departs from democratic ideas about accountability for the use of power and from the legal expections that for every legal right there is a legal remedy**"

Rule 17(1)(a) provides that this Court may exercise its supervisiary powers when a federal Court of appeals has sanctioned a

departure by a lower Court from the accepted and usual course of judicial proceedings.

There has been such a departure in this case.

The United States District Court for the Southern District of IOwa refused to permit the Petitioner to conduct discovery and found by a general statement and no facts, that there was support for the conclusion of the Iowa Supreme Court. In substance Judge McManus, without permitting discovery and setting out facts approved the judgment of the Supreme Court of Iowa and disbarred the Petitioner in the Northern District.

Judge Gibson by reading the record and the appendix in the Supreme Court of Iowa was that by amendment to answer, the Petitioner alleged that he did not request Myers to name him beneficiary in his will. That he did not request Myers to name him executor. That that there was no disciplinary rule in effect prohibiting the preperation of the will, there was no notice to Petitioner

that his writing of the will could subject him to disciplinary action. He was deprived of due process. That the attorneys for the Ethics Committee engaged in deception and misconduct depriving Petitioner of procedural due process. That the Ethics Committee's refusal to participate in discovery violated Petitioner's right to due process. That there was no conflict of interest, appendix of Supreme Court of Iowa, p. 21 to p. 29. The appendix in the Supreme Court of Iowa further reflected the fact that Mr. Keith stated in open Court that he would consider matters which were in evidence whether such matters were written, the issues made by the pleadings or not appendix in Supreme Court of Iowa, p. 264-265.

The Complaint against the Petitioner was filed for the purpose of forcing settlement of will contest action, p. 550 appendix in Supreme Court of Iowa. A member of the Grievance Commission before the filing of its finding's had released a story

that their Commission was investigating Petitioner, appendix in Supreme Court of Iowa p. 552.

The Commission further found that the attorney-client relationship between Myers and Petitioner ceased as of October of 1975, Supreme Court of Iowa appendix p. 546. That there was a conflict of interest in representing Myers, appendix in Supreme Court of Iowa p. 551. That the Commission relied upon a 1976 Iowa Supreme Court decision, In re: Frerichs 238 NW2d 764, appendix in Iowa Supreme Court p. 553.

Edward H. Jones, the secretary of the Iowa State Bar Association, read over WMT, a local radio station, portions of the Findings of fact, Conclusions of Law, and Recommendations of the Grievance Commission, appendix in the Supreme Court of Iowa p. 569.

The appendix in the Iowa Supreme Court gives evidence of the bias of the Grievance Commission. Judge Gibson in estimating the value of the Myers estate did not state the

date at which he valued the estate. There was a copy of a financial statement of Myers Farms, Inc. dated June 1, 1972, the evidence showed that Myers signed the financial statement and that the values placed on the assets were placed there by Myers. There was included in the financial statement the Hess farm which was claimed by Morningstar.

Appendix(I) which was Exhibit W, shows that the value of the Myers estate at his death, was $888,000. Judge Gibson clearly misunderstood that the main item of value of the Myers estate was his stock in Myers Farms, Inc. Judge Gibson failed to take into consideration that there was not way in which the value of the stock could be related to the value of the land without extensive legal proceedings. Appendix I describes that would have to be done to enable a tock holder to cash in on the value of the land.

Judge Gibson stated, "The Grievance Commission adopted a neutral stance".

No. 80-1254 and No. 80-1545 on page 27, it is stated, "the Panel members asked 979 questions compared to 1436 questions asked by Gaudineer, Ethics Committee Counsel, and 1583 questions asked by Butler, Counsel for Randall".

The Petitioner has in the Federal Courts sought the right to have a Judge from outside the state of Iowa appointed to conduct full discovery. A lawyer from outside the state of Iowa, with no connections with any of the parties, could act as master.

There is no evidence in the findings or conclusions of either the Northern or Southern United States District Court that either of the Courts had examined the record or appreciated the issues. The Petitioner was disbarred by a Panel of the Eighth Circuit consisting of Judge Gibson, a senior Judge, and two Circuit Court Judges. Judge Gibson clearly misinterpreted the record and did not attempt to consider or discuss the errors of Judge Harris in stating facts

as was pointed out in Appellant's Reply Brief, p. 1.

Perhaps the most compelling reason for calling upon the supervisary powers of this Court relate to the holding of the Panel that "Ethical considerations are more than aspirational and are mandatory.[3]"

The Eighth Circuit is telling the members of its bar that it will discipline for the violation of any one of the 138 Ethical Considerations which it may select. This without any advance notice.

CONCLUSION

The May 11, 1981 issue of US News and World Report in an article, "Why Lawyers are in the Dog House", notes:

> "John D. Randall, a former ABA President, was disbarred for naming himself the beneficiary of a client's

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[3]We are not holding that every violation of an ethical consideration would be grounds for disciplinary action, but are holding that the violation herein involved, being significant and substantial, and having been found by the Iowa Supreme Court to be a basis for disciplinary proceedings, is also thought by us to consitute an appropriate basis for action.

two million dollar estate. He is appealing a finding that he violated conflict-of-interest rules."

There have been many complaints about the Code of Professional Responsibility. The Petitioner was in the House of Delegates of the American Bar Association at the time of the debate on the Code, it is his sincere belief that if the members of the House of Delegates had believed that a lawyer could be disciplined for the violation of an Ethical Consideration, it would have been necessary to have amended the Code before it would have been adopted.

The Code is being studied by the Kutak Committee and the present Code is to be replaced.

A Writ of Certiorari should be issued in this case that this Court may outline for the American lawyer reasonable guidelines as to the bounds of permissable conduct in the practice of law and the necessity of definite

rules so that the Constitutional rights of lawyers as a class may be preserved.

Respectfully submitted,

JOHN D. RANDALL, SR.
PRO SE

80-2060

Office-Supreme Court, U.S.
FILED
JUN 1 1981
ALEXANDER L. STEVAS,
CLERK

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APPENDIX TO PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Eighth Circuit.

JOHN D. RANDALL, SR.
330 1st Street SE
Cedar Rapids, Iowa 52401

Pro Se

A

REMARKS OF JOHN D. RANDALL, SR. AT THE SPECIAL ADMISSIONS CEREMONY OF THE UNITED STATES SUPREME COURT AUGUST 30, 1960.

It is an honor for any lawyer to appear before the Supreme Court of the United States. Under these particular circumstances the pleasure is felt all the more profoundly. Today more than two-thousand members of the American Bar Association will be admitted to practice before this, the highest court in our land.

It is especially significant that representatives from other common law countries are present at the ceremony. The common law is a judge-centered system of law; the judge plays a much more important role in our system than in other legal systems. This is especially true in the United States where the doctrine of judicial review has played such an important part in our legal development. Therefore, it is only fitting that the

American Bar Association pause in its deliberations to pay homage to this court and through it to judges serving at all levels of our judicial system.

I should like to use this occasion to emphasize that the right of the judiciary to function in an atmosphere of respect and free from outside pressure is an essential ingredient of our system. An independent judiciary was not the gracious gift of some benevolent sovereign. Rather it is a right that was hard won by Englishmen. The independent spirit of the English judge is reflected in the response of Justice Jones when he was told by James II that he must give up either his opinions or his place. Justice Jones answered "For my place I care little. I am old and worn out in the service of the Crown. But I'm mortified to find that Your Majesty thinks me capable of giving a judgment which none but an ignorant or dishonest man could give." The reply of the King

was firm, "I am determined to have twelve judges who will be all of my mind as to the matter." "Your Majesty," answered Jones, "may find twelve judges of your mind, but hardly twelve lawyers."

The judiciary will not long remain independent without the constant support of the legal profession in a similar vein it is the responsibility of the lawyers to aid the judiciary in its work of administering justice. We must cooperate with judicial selection. In the last analysis this is the most effective way that we can honor the judiciary.

The Supreme Court of the United States has a distinguished heritage as do you lawyers whose names will shortly be inscribed upon the roles of those admitted to practice before this court. There your names will take their places along side those of William Maxwell Evarts, David W. Field, and John W. Davis. The cases you argue will be heard by the intellectual heirs of John Marshall, Oliver Wendell Holmes,

Jr., Charles Evans Hughes, Louis D. Brandeis and Joseph Story. The momentous decisions of this court have interpreted our Constitution and kept it a living thing in the Mid-Twentieth Century.

May we who practice before this court be worthy of our predecessors and the distinguished jurists, who hear our arugments.

B

BIOGRAPHICAL SKETCH

John D. Randall was born in Lisbon, Iowa, November 30, 1899. His father, Mac J. Randall, was pastor of the Evengelical Church at Lisbon, Iowa, and was attending law school at the University of Iowa. He graduated from the University of Iowa in 1901.

His grandfather on his father's side emigrated from Scotland in 1858, settled in Worth County, Iowa, and was a soldier in the Union army serving under General Banks, his grandfather on his mother's side also served in the Union army, in the army of the Potomac.

His father practiced law in Lisbon, Iowa, until 1907, when he moved to Cedar Rapids, Iowa.

He attended grade school in Lisbon, Iowa, and in Cedar Rapids, Iowa. He graduated from Washington High School in Cedar Rapids, Iowa, in June of 1917.

He attended Coe College from the fall of 1917, until the close of the school year in June of 1918. He enlisted in the United States Army and was sent to the Iowa State College of Agriculture in Ames, Iowa, where he remained for the college year, after which he returned to Coe for the college year of 1919-20. In 1920 he entered the College of Law at the University of Iowa from which he graduated with an L.L.B. in 1923.

In 1923 he opened an office for the practice of law in Cedar Rapids, Iowa, and practiced law in Cedar Rapids, Iowa, until the time his license to practice was revoked in December of 1979.

He is a member of the First Presbyterian

Church in Cedar Rapids, Iowa, and a Mason. He belongs to the Blue Lodge, the Consistry, and the Shirne.

While his vocation was the practice of law, he should probably admit that his avocation was working in the Organized Bar. His biographical sketch should include his various activities in the Organized Bar.

Prior to 1939, he was active in the unauthorized Practice Committee of the Iowa State Bar Association, at one time being the chairman of that committee.

From 1940 on until the revocation of his license he was active in the work of the American Bar Association. There follows on a year-by-year basis the committee work and other work which he did in the American Bar Associatio He joined the American Bar Association in 1928, and started to actively participate in the committee work in the American Bar Association in 1939. His activity is hereinafter set out on a yearly basis:

1939--Unauthorized Practice of Law Committee; attended two regional conferences and conference with the National Association of Real Estate Boards in Cleveland, Ohio, Vol. 65, Reports of A.B.A., page 211.

1940--Health and Accident Law Committee, Section of Insurance Law.

1941--Health and Accident Law Committee, Section of Insurance Law.

1942--Health and Accident Law Committee, Section of Insurance Law.

1943--Health and Accident Law Committee, Section of Insurance Law; Representative of ABA on National Conference of Realtors and Lawyers.

1944--National Conference Group Representative of ABA Realtors and Lawyers; Health and Accident Law Committee, Section of Insurance Law.

1945--Unauthorized Practice Committee; National Conference ABA and American Bankers Association Trust Division; National Conference Realtors and Lawyers(Co-Chairman); Health and Accident Law Committee, Section of Insurance Law(Vice-Chariman).

1946--Unauthorized Practice Committee(Chairman); National Conference Lawyers and Certified Public Accountants; National Conference Lawyers and Representatives of American Bankers Association; National Conference of Lawyers and Life Under Writers; Conference Committee on Adjusters; Health and Accident Law Committee, Section of Insurance Law(Vice-Chairman).

1947--Unauthorized Practice Committee(Chairman); National Conference of Lawyers and Certified Public Accountants; National Conference of

Lawyers and Representatives of American Bankers Association, Trust Division; National Conference of Lawyers and Life Under Writers.

1948--Unauthorized Practice Committee(Chairman); National Conference of Lawyers and Certified Public Accountants; National Conference of Lawyers and Representatives of American Bankers Association, Trust Division; National Conference of Lawyers and Life Under Writers; Health and Accident Law Committee, Section of Insurance Law.

1949--State Delegate Representing Iowa members of American Bar Association in House of Delegates; Unauthorized Practice Committee(Chairma National Conference of Lawyers and Certified Public Accountants; National Conference of Lawyers and Representatives of American Bankers Association, Trust Division; National Conference of Lawyers and Life Under Writers; Conference Committee on Adjusters; Health and Accident Law Committee, Section of Insurance Law(Vice-Chairman).

1950--State Delegate Representing Iowa members of American Bar Association in House of Delegates; Unauthorized Practice Committee (Chairman); National Conference of Lawyers and Certified Public Accountants(Co-Chairman); National Conference of Lawyers and Representatives of American Bankers Association, Trust Division; National Conference of Realtors and Lawyers; National Conference of Lawyers and Life Under Writers; Health and Accident Law Committee, Section of Insurance Law(Vice-Chairman).

1951--State Delegate representing Iowa members of American Bar Association in House of Delegates; Unauthorized Practice Committee (Chairman); National Conference of Lawyers and Certified Public Accountants(Co-Chairman); National Conference of Lawyers and Representatives of American Bankers Association, Trust Division; National Conference of Lawyers and Life Insurance

Companies(Co-Chairman); National Conference of Lawyers and Life Under Writers; National Conference of Lawyers and Adjusters; Health and Accident Law Committee, Section of Insurance Law.

1952--State Delegate representing Iowa Members of American Bar Association in House of Delegates; Committee on Rules and Calendar of House of Delegates(Chairman); Unauthorized Practice Committee; Joint Conference on Professional Responsiblity formed by Association of American Law Schools and American Bar Association(Co-Chairman); National Conference of Lawyers and Certified Public Accountants(Co-Chairman); National Conference of Lawyers and Representatives of American Bankers Association, Trust Division; National Conference of Lawyers and Life Insurance Companies; National Conference of Lawyers and Life Under Writers; Health and Accident Law Committee, Section of Insurance Law(Vice-Chairman).

1953--State Delegate representing Iowa members of American Bar Association in House of Delegates; Rules and Calendar, Committee of House of Delegates(Chairman); Unauthorized Practice Committee; Joint Conference on Professional Responsiblity formed by Association of American Law Schools and American Bar Association(Co-Chairman); National Conference of Lawyers and Certified Public Accountants(Co-Chairman); National Conference of Lawyers and Representatives of American Bankers Association, Trust Division; National Conference of Lawyers and Life Insurance Companies; National Conference of Lawyers and Life Under Writers.

1954--House of Delegates(Chairman); Board of Governers; Administration Committee of Board of Governers; Chairman of State Delegates; Board of Directors, American Bar Foundation(Vice-President); Board of Editors, American Bar Association Journal(Exofficio); Committee on Public Relations(Exofficio); National Conference of Lawyers and Certified Public Accountants(Co-

Chairman); National Conference of Lawyers and Representatives and Adjusters; Treasury Circular No. 23(Special Committee Chairman); Health and Accident Law Committee, Section of Insurance Law(Vice-Chairman); Joint Conference on Professional Responsibility formed by Association of American Law Schools and the American Bar Association(Co-Chairman).

1955--House of Delegates(Chairman); Board of Governors, American Bar Association; Administration Committee of Board of Governers(Chairman); State Delegate(Chairman); American Bar Foundation(Vice-President); Board of Editors; American Bar Association Journal(Exofficio member); United States Commission for the Celebration for the 200th Anniversary of the Birth of John Marshall(Representatives of the American Bar Association).

1956--Member of House of Delegates(Former Chairman--House of Delegates); Regional Meetings Committee(Chairman); Health and Accident Insurance Law Committee of Section Insurance Law(Vice-Chairman); Joint Conference on Professional Responsiblity formed by Association of American Law School and American Bar Association(Co-Chairman); National Conferenc of Lawyers and Representatives of American Bankers Association, Trust Division.

1958--House of Delegates(Former Chairman of the House of Delegates); National Conference of Lawyers and Representatives of American Bankers Association, Trust Division; Joint Conference on Professional Responsibility concluded its work and the report was filed, to be considered at the Mid-Winter meeting following the reception of the statement by the Association of American Law Schools(Vol. 83, Reports of American Bar Association, page 167).

1959--House of Delegates(Former Chairman of the House of Delegates).

1960--President of ABA; member of House of Delegates; American Bar Association Journal, Board of Editors(Exofficio); Board of Governors, President American Bar Foundation; Joint American Law Institute--American Bar Association Committee on Continuing Legal Education(Vice-Chairman).

1961--Member of the Board of Governors(Last Retiring President); Committee to Cooperate with the Executive Branch of the Government--Committee of Board of Governors(Chairman); American Bar Foundation, Board of Directors; House of Delegates(Last Retiring President of American Bar Association and former Chairman of House of Delegates).

1962--House of Delegates(Former President of American Bar Association former Chairman of House of Delegates); Consider establishment of a section of general practice, Special Committee(Chairman).

1963--Member of House of Delegates(Former President of American Bar Association former Chairman of House of Delegates); Section of General Practice(Chairman); National Conference of Lawyers and Insurance Companies Writing Liability Insurance(Co-Chairman). This Committee was established in 1962, for the purpose of eliminating insofar as possible misunderstanding as to what may constitute proper insurance company practices in furnishing legal counsel for their insured under liability policy.(Vol. 87, Reports of American Bar Association, 1962, page 463.

1964--House of Delegates(Former President of American Bar Association former Chairman House of Delegates); Conference of Lawyers and Casualty Insurance Companies(Co-Chairman); American Bar Endowment(Grants Committee); General Practice Section(Council Exofficio).

1965--House of Delegates(Former President and former Chairman of the House); General Practice Section; Member of Council Exofficio as last retiring Chairman.

1966--House of Delegates(Former President American Bar Association and former Chairman of the House of Delegates); Standing Committee Professional Grievances (Chairman); National Conference of Lawyers and Liability Insurers (Co-Chairman); American Bar Association Endowment(Vice-President).

1967--House of Delegates(Former President American Bar Association former Chairman of the House of Delegates); Standing Committee Professional Grievances(Chairman); General Practice Section, Committe--Canons of Ethics (Chairman); American Bar Endowment(Vice-President); National Conference of Lawyers and Liability Insurers(Co-Chairman).

1968--House of Delegates(Former President and former Chairman of the House of Delegates; Standing Committee, Professional Grievances (Chairman); General Practice Committee Canons of Ethics(Chairman); American Bar Endowment (President); National Conference of Lawyers and Liability Insurers.

1969--House of Delegates(Former President and former Chairman of the House of Delegates); Standing Committee, Professional Grievances(Chairman); American Bar Endowment (President); National Conference of Lawyers and Liability Insurers(Co-Chairman).

1970--House of Delegates(Former President and former Chairman of the House of American Bar Association); American Bar Endowment(Board of Directors); General Practice Section Committee Canons of Ethics(Chairman); National Conference of Lawyers and Liability Insurers (Co-Chairman); American Bar Endowment(Member

of Board of Directors).

1971--House of Delegates(Former President and former Chairman of the House of Delegates); American Bar Endowment(Member of Board of Directors); National Conference of Lawyers and Liability Insurers(Co-Chairman). This conference prepared a pamphlet setting out guiding principles which was referred to in its report to the House of Delegates (96 Reports of American Bar Association, 1971, at page 230); American Bar Endowment(Board of Directors).

1972--House of Delegates American Bar Association(Former President of American Bar Association and former Chairman of the House); American Bar Endowment(Board of Directors); National Conference of Lawyers and Liability Insurers(Co-Chairman). This National Conference group presented its "guiding principles" to the House of Delegates and such "guiding principles" were adopted by the House of Delegates(97 Reports of American Bar Association, at page 160. The work of this National Conference group therefore concluded as stated in 97 Reports of American Bar Association, at page 254).

1973--House of Delegates(Former President and former Chairman of the House of American Bar Association); American Bar Endowment(Board of Directors); General Practice Section Committee, Liaison House of Delegates, Scope and Correlation(Co-Chairman); Council(Honorary member).

1974--House of Delegates(Former President and Chairman of the House of Delegates, American Bar Association); American Bar Endowment Director Emeritus; General Practice Section (Honorary member of Council); Liasion with House of Delegates(Vice-Chairman).

1975--House of Delegates(Former President and Chairman of the House of Delegates of American Bar Association); American Bar Endowment(Board of Directors--Director Emeritus); Section of Science and Technology, Chairman Automated Law Research Committee: General Practice Section Committee on Assistance to Sole Practioners and Members of Small Firms(Chairman).

1976--House of Delegates American Bar Endowment (Board of Directors--Directors Emeritus; General Practice Section(Honorary Member of Council).

1977--House of Delegates American Bar Endowment (Board of Directors--Directors Emeritus: General Practice Section(Honorary Member of Council).

C

MOTION TO HAVE ORDER WITH REFERENCE TO THE STRIKING OF NAME OF PETITIONER FROM THE ROLLS HEARD EN BANC AND RULING.

John D. Randall, Sr., respectufl1y states to the Court:

1. That on July 12, 1980, he received a certified copy of the Order with reference to the striking of his name from the Roll of Attorneys of the Court.

2. July 15, 1980, he made inquiry of the Clerk of the United States Court of Appeals relative to the number of the case and how the Response should be titled and on July 22,

1980, was informed by a Deputy Clerk that there was no file number and no rule with respect to the form of the Response or the number of copies which should be filed.

3. That on July 23, 1980, he forwarded to the Clerk of the United States Court of Appeals for the Eighth Circuit, nine(9) copies of his Response.

4. That on August 12, 1980, the Court consolidated the three(3) appeals pending in the United States Court of Appeals for the Eighth Circuit together with the Order to Show Cause. That the Order to Show Cause was then assigned a number, 80-8117.

5. That because of the very extensive record and the importance of this particular hearing relating to the Order to Show Cause, together with the fact that there are no specific rules, your respondent movant believes that he should be accorded the right to have the hearing En Banc. He has no objections to the consolidation, but if the Order to Show Cause and the Response is to be heard in the

consolidated cases, as such consolidated appeals and the Show Cause Order should be heard En Banc.

The Respondent moves that the Order to Show Cause and his Response be heard by the entire Court either in conjuction with the consolidated appeal or seperately, and for such other and further order in connection therewith as may be necessary in the premise.

Dated this 28th day of October, 1980.

RULING OF COURT ON THE FOREGOING MOTION.

Motion of appellant pro se for en banc hearing has been considered by the Court and is denied.

November 11, 1980.

D

PORTIONS OF THE OPINION OF THE EIGHTH CIRCUIT COURT OF APPEALS RELATING TO THE DISBARMENT OF PETITIONER BEING DIVISION III OF OPINION.

III.

We next address the matter of the potential suspension or disbarment of Randall from this Court. Randall was issued a show cause order on July 10, 1980, concerning why he should not be disbarred from this court. See Federal Rule of Appellate Procedure 46(B); Theard v. United States, 354 U.S. 278, 282 (1957). Randall responded principally by challenging the factual basis of the Supreme Court of Iowa's opinion in his disbarment from that court. See Randall, Supra, 285 N.W.2s at 161-64.

The limit standard of review of the factual findings of the Supreme Court of Iowa involving Randall was outlined in Selling v. Radford, supra, 234 U.S. at 46; ante at____. Accordingly, we have reviewed the entire record of the state disbarment proceedings including reading the voluminous transcript of Randall's hearing before the Grievance Commission and the appendix filed in the Supreme Court of Iowa case. The evidence produced, based in large part upon Randall's uncontroverted testimony, established that Randall, on March 14,

1973, drew a will for Lovell Myers, his business partner for over twenty-five years, in which Myers left his entire estate, conservatively valued at over two million dollars. to Randall. We agree with the Supreme Court of Iowa that this action violated Ethical Canon 5-5 of the Iowa Code of Professional Responsibility for Lawyers, as in effect in 1973, which provided:

> A lawyer should not suggest to his client that a gift be made to himself or for his benefit. If a lawyer accepts a gift from his client, he is peculiarly susceptible to the charges that he unduly influenced or overreached the client. If a client voluntarily offers to make a gift to his lawyer, the lawyer may accept the gift, but before doing so, he should urge that his client secure disinterested advice from an independent, competent person who is cognizant of all the circumstances. Other than in exceptional circumstances, a lawyer should insist that an instrument in which his client desires to name him beneficially be prepared by another lawyer selected by the client. (Emphasis added.)

The Supreme Court of Iowa found the "exceptional circumstances" clause did not apply in Randall's case. Randall, supra 285 N.W.2d at 165. On appeal, Randall makes

the same argument in favor of its application as he did in the Iowa proceedings. Randall contends that the long years of his business partnership with Lovell Myers should allow him to draw a will leaving him the entire estate.

We disagree. First, the amount of property involved, plus the fact that Myers had a living daughter and two grandsons, put Randall on notice that other parties might have a significant interest in pursuing a will contest if Randall were to draw a will naming himself as beneficiary. Second, circumstances surrounding the drawing of the will, namely the controversy concerning the land deed involving Lovell Myers and an employee, foreman Gilbert Morningstar, should have alerted Randall so the charges of overreaching or undue influence which might arise if he were to draw the will. Randall erred and erred grievously.

Randall next argues that even if he violated Ethical Canon 5-5 he should not be

disbarred for a merely ethical, as opposed to disciplinary, violation. The Supreme Court of Iowa, in Committee on Professional Ethics and Conduct of the Iowa State Bar Association v. Behnke, 276 N.W.2d 838, 840 (Iowa Sup. Ct.) appeal dismissed, 444 U.S. 805 (1979), held that "violation of an ethical consideration, standing alone, will support disciplinary action." Randall contends that holding violate both due process and the ex post facto clause.

Randall's contention that violations of ethical canons could not lead to porfessional discipline, as that would be violative of due process, is not well taken. Ethical considerations are more than aspirational and are mandatory.[3] The Supreme Court of Iowa, in

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[3]We are not holding that every violation of an ethical consideration would be grounds for disciplinary action, but are holding that the violation herein involved, being significan and substantial, and having been found by the Iowa Supreme Court to be a basis for disciplina porceedings, is also thought by us to constitut an appropriate basis for action.

Matter of Frerichs, 238 N.W.2d 764, 769, specifically held:

> All lawyers practicing before this court are bound by the cannons and the provisions of the Iowa Code above set out. They are not free to view them merely as aspirational. A canon cannot be ignored by an attorney upon the claim he believes it conflicts with his view of a constitutionally protected right.

Furthermore, it appears that the prohibition contained in EC 5-5, prohibiting the drafting of a will by an attorney making himself a beneficiary, is but the current articulation of a long-standing prohibition against that practice. Obviously such a situation is fraught with a high potential for overreaching and abuse. The prohibition in EC 5-5 is also only a restatement of old Canon 9, Canons of the American Bar Association. In Re Krotenberg, 111 Ariz. 251, 527 P. 2d 510, (1974); Columbus Bar Association v. Ramey, 32 Ohio St.2d 91, 290 N.E.2d 831 (1972); In Re Jones, 254 Or. 617, 462 P.2d 680 (1969); In Re Kneeland, 233 Or. 241, 377 P.2d 861 (1963); In Re MacFarlane, 10 Utah 2d 217, 350 P.2d 631 (1960); In Re Moore, 218 Or. 403, 345 P.2d 411 (1959); Lantz

vs State Bar of California, 212 Cal. 213, 298 P. 497 (1931).

Randall also contends that application of EC 5-5 to his situation constituted an ex post facto enforcement of that prohibition. The ex post factor contention falls for two reasons: (1) The ex post facto clause and concept is only applicable in criminal cases. See Galvan v. Press, 347 U.S. 522, 531 n.4 (1954); Nicholson v. Judicial Retirement and Removal Commission, 562 S.W.2d 306, 308 (Ky. 1978). And (2) there is no true ex post facto situation here presented, as a prohibition both in the old canons of professional responsibility and in the new codes have condemned the practice herein charged.

The Supreme Court of Iowa also found that Randall's representation of both his own and Myers's corporate interests in the Morningstar land title suit was a conflict of interest in violation of Iowa's Disciplinary Rules 5-101(A)

and 5-104(A).[4] The Court based this finding on Randall's suspicions concerning the forged deed involving Myers and Morningstar. We agree with the Supreme Court of Iowa that, in these circumstances, Randall was under a duty to withdraw from representation of Myers's fifty percent interest in the corporation.

We therefore find that Randall's actions with regard to the will and the representation of Myers's corporate interest warrent disbarment from this court.

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[4]Iowa Disciplinary Rule 5-101(A) provides:

> Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financia, business, propery, or personal interests.

Disciplinary Rule 5-104(A) provides:

> A lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise his professional judgment therein for the protection of the client, unless the client has consented after full disclosure.

E

REQUEST TO UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT THAT THE SHOW CAUSE ORDER BE REHEARD EN BANC AND DENIAL OF THAT REQUEST.

The Petitioner John D. Randall, Sr., herein Randall, respectfully states:

That the number 80-8117 was assigned to his Pro Se "Response to Order Requiring Showing Why the Name of a Certain Attorney Should Not be Stricken From the Roll of Attorneys of the Court"(Herein Response). That a panel of three of the Court in an Opinion filed January 21, 1981, held "and we disbar Randall from the practice of law in the United States Court of Appeals for the Eighth Circuit".

There was no reference in the Opinion to the Response or the Amendment to the Response filed by Randall.

That Randall believes that if the Court had considered the Response and the Amendment to the Response and the facts referred to therein the result would have been that he would not have been disbarred in the Eighth Circui

The Supreme Court of the United States in passing on the disbarment of Mr. Ruffalo by the Sixth Circuit Court of Appeals, showed that such disbarment was by the Court En Banc; In re: Ruffalo 390 U.S. 544. The Circuit Court of Appeals for the Eighth Circuit has not permitted a DeNovo Review nor can Randall determine from the Opinion whether the Panel considered his Response or the Amendment to the Response.

Further the Panel is now announcing that it will disbar for the violation of Ethical Considerations.

Considering the fact of the disbarment, the reasons heretofore set out and for all of the further reasons which will be set out in the Petition for Rehearing to which reference is hereby made, Randall is entitled to a rehearing En Banc.

That in view of the serious nature of the charge the disbarment and the fact that there has been a misunderstanding of the facts coupled

with the fact that some of the portions of the very volumnious record have been obviously overlooked, Randall is entitled to a rehearing En Banc for all of the foregoing and the further reasons which will appear in his Petition for Rehearing which will be filed herein, to which reference is made.

That reference has been made in agreement that the only proof of the fact that the Ethics Counsel, Mr. Gaudineer had been the Affidavit of Randall. That the statement referred to in the Randall Affidavit was the statement of Ronald W. Wendt who, at that time, was an associate of Randall. That there is attached hereto marked Exhibit A, and by reference made a part hereof the Affidavit of Ronald W. Wendt with reference to these facts.

WHEREFORE Randall prays that he be given a Rehearing En Banc for all of the reasons set out herein, and for the further reasons that justice will be served thereby.

EXHIBIT A

I, Ronald W. Wendt, being first duly

sworn on oath depose and say:

That I am a regular practicing lawyer in Cedar Rapids Linn County Iowa and prior to the date of the revokation of the license of John D. Randall, Sr., I was associated with him in the practice of Law.

That I handled the settlement of the Will Contest action brought by Marie Jensen against the estate of Lovell Myers, deceased, such settlement was consummated in Fort Madison, Iowa, at the office of Npaier, Napier, and Wright in that city. When the settlement was made, I asked Mr. William H. Napier why Marie Jensen had filed a complaint against John D. Randall, Sr., with the Ethics Committee of the Iowa State Bar Association. Mr. Napier replied or replied in substance that it was to force a settlement of the Will Contest action. That while there was no specific agreement with respect to the abandonment of the Complaint, it was the concensus that the Jensens would not actively pursue the Complaint against John D. Randall,

Sr., after the settlement of the Will Contest action.

That during the month of September, 1977, John D. Randall, Sr., visited with me in regard to going to Des Moines, Iowa, and visiting with the Sub-Committee of the Ethics Committee with respect to the Complaint. This was in response to a letter from Mr. Gamble forwarded to Mr. Randall under the date of September 28, 1977. It was our conclusion that Mr. Randall should go to Des Moines, Iowa, visit with the Sub-Committee, and offer to permit the Sub-Committee or its representatives to go over all of the files and records of John D. Randall, Sr., relating to his associations with Myers.

Upon return from Des Moines Mr. Randall visited with me about what had occurred at the meeting of the Sub-Committee and Mr. Randall wrote a letter to Mr. Gamble expressing his concern with respect to certain inquires which had been made by Mr. Gamble. That I

examined a copy of the letter which Mr. Randall forwarded to Mr. Gamble under the date of October 12, 1977.

Following October 12, 1977, Mr. Gaudineer, the "Ethics Counsel" came to the office of John D. Randall, Sr., and Mr. Randall requested me to sit in with him at the time Mr. Gaudineer would be given any records he wished to examine. That I did sit in with Mr. Randall at that time and Mr. Gaudineer was furnished with all of the records that he requested during the time of that conference. While I am not entirely certain as to the date, it is my recollection that it was either the 8th or 9th of November, 1977. I do know that Mr. Gaudineer wrote Mr. Randall a letter November 11, 1977, requesting copies of the Morningstar Depositions. I sent Mr. Gaudineer these Depositions and Mr. Gaudineer returned the Depositions to me under the date of November 29, 1977.

That during our visit with Mr. Gaundineer our office I told Mr. Gauindeer in substance

that Mr. Napier had told me that the Complaint had been filed by Marie Jensen against John D. Randall, Sr., for the purpose of forcing a settlement of the Will Contest action. I am not certain of my exact words but the substance was that this was what Mr. Napier had told me at the time of the settlement.

Further affiance sayeth not.

DENIAL OF REQUEST THAT SHOW CAUSE ORDER BE HEARD EN BANC.

The Court having considered appellant'a request that the show cause order from this Court be reheard by the Court en banc in Case No. 80-8117; appellant's pro se petition for rehearing en banc in Case No. 80-8117; and petition for rehearing en banc filed by counsel for appellant in Nos. 80-1254/1451/1545 and Misc. No. 80-8117; it is now here ordered by the Court that these petitions for rehearing en banc be denied.

March 3, 1981

F

PETITION FOR REHEARING EN BANC PRO SE.

This is the Pro Se Petition for Rehearing En Banc by John D. Randall, Sr. in No. 80-8117.

The Opinion by a Panel of this Court filed January 21, 1981, stated:

> "On November 14, 1979, the Supreme Court of Iowa disbarred Randall for drawing a Will for a business partner, in which Randall named himself sole beneficiary, and for engaging in a conflict of interest by representing a corporation wholly owned on an equal basis by Randall and his business partner in litigation with a former employee."

There was the further recitation in the Opinion:

> "Randall's disbarment in Iowa resulted from his actions, found to be a conflict of interest, in connection with drawing a Will for Lovell Myers and also for Randall's representation of Myers corporate interest."

The Opinion further recites:

> "On July 10, 1980, this Court entered an Order for Randall to Show Cause why he should not be suspended or disbarred by the Eighth Circuit. This originial proceeding is No. 80-8117, wherein Randall contends he should not be disbarred from this Court."

In response to the Order to Show Cause referred to in the decision Randall filed a Response Pro Se of 47 pages and an Amendment

to Response of 17 pages.

This Petition for Rehearing is Pro Se, in the Response to Order Requiring a Show Cause Randall referred to himself as the Respondent, however in the caption of the Opinion in the No. 80-8117 he is referred to as the Petitioner. In this his Petition for Rehearing En Banc he shall refer to himself as Randall.

Thus whether he was correctly referred to as "Petitioner" or as "Respondent" this Court will understand that this Petition Pro Se and is in Cause No. 80-8117.

Randall is not a member of a minority nor is he an activist lawyer, he is therefore not in a position to seek assistance from the Civil Liberties Union or the National Lawyers Guild. This is being mentioned because of the fact that in the Committee on Professional Ethics and Conduct of the Iowa State Bar Association, Appellee vs. Leona Durham, Appellant decided May 30, 1979; 279 N.W.2d 280 at 284, the Court observed:

"In its amicus curiae brief, National Lawyer's Guild argues that the I.C.P.R.L. is being applied to the Respondent in a manner violative of the Equal Protection Clause of the Fourteenth Amendment to the Federal Consitution***"

In the John E. Behnke case, the Opinion of which is reported at 276 N.W.2d 838(Iowa 1979) Hugo L. Black, Jr., Esq. Counsel for Mr. Behnke in seeking a Writ of Certiorari from the Supreme Court of the United States, observed on pages 8 and 9:

"This Iowa lawyer has been disciplined for conduct which clearly was not a disciplinary offense when committed. Indeed the Iowa Bar--with the approval of the Iowa Supreme Court--in the process of getting Behnke holds that conduct described in the Code as merely aspirational may, when ever it is felt necessary to get at a particularly offensive character, be deemed a disciplinary offense.

This is the stuff of witch hunts. The due process clause surely entitled lawyers to fair warning of what conduct will result in discipline, to freedom from discipline inflicted by authority of Ex Post facto judicial glosses on bible-like ethical pronoucement and a regulation by a rule of law and not men."

Randall during his professional career which extended from August 1923, until November 14, 1979, had at all times practiced law, he

was not a real estate appraiser, a farmer, or engaged in any other business or profession than that of the law. His only diversion was, that from 1950 until in the early 1970's, he spend between 25 percent and 90 percent of his time working with other for the Organized Bar. In all probability in 1959 and 1960, he spent at least 90 percent of his time for the Organized Bar. His vacations consisted of attending meetings of committees and meetings of Bar groups outside of Cedar Rapids, Iowa. This certainly should not be interpreted as meaning that he is making any complaint, because of the work that he did for the Organized Bar he has had the privilege of the friendship of some of the outstanding lawyers in the United States each of whom was giving unselfishly of his time and ability for the good of the profession and the benefit of the public. This is mentioned in order to inform the Court that he did not have any time to do anything other than the practice of his profession and his work for the Organized Bar. It

is possible that Randall should be disbarred for neglecting his personal affairs because of the time he spent working for the Organized Bar.

During the 1970's he was practicing law with three associates, he rented 3,300 square feet of space in the loop district of Cedar Rapids, Iowa, had a complete working law library, and all of the office equipment necessary to maintain and conduct an office with four lawyers. While not out of town on Bar trips, he arrived at the office at approximately 7:00 a.m. and left at approximately 5:00 p.m. This generally included Saturday. He frequently took abstracts home for examination and would sometimes perform other legal work which did not require research at home. This routine was not followed from and after the middle of June of 1972, when his wife was hospitalized with a terminal illness. Following that date and until the date of her death, while he was in town Randall would leave the office at approximately 3:00 p.m. in order to be with his wife at the hospital.

March 14, 1973, Lovell Myers, his business

partner, came to Randall's office for the purpose of persuading Randall to agree to permit Myers to continue to employ Morningstar who had charged Myers on Feburary 17, 1973, with having forged a deed to a certain 80 acres of land. Februray 17, 1973, Lovell Myers had agreed that Morningstar should be fired. At that time Myers knew that he, Myers, had been misapropriating corporate funds and had been wrongfully using funds of the corporation for the benefit of Morningstar and otherwise for at least 20 years at that time. Randall had no knowledge of these facts. In order to reinforce his wish to retain and continue to employ Morningstar he asked Randall to prepare his Will and directed him to provide that all of his property should be left to Randall. This was done. Randall at all times has maintained that these facts, in and of themselves, furnished the "extraordinary circumstances" which were referred to in EC 5-5. The Court has ignored these facts and has arbitrarily determined that there were no extraordinary

circumstances.

In order to achieve the disbarment of Randall, it was necessary to make Randall, Myers personal attorney, one of Randall's secretarys stated that Randall was not Myers personal lawyer. This was set out in Randall's Response to the Order to Show Cause, on page 7 of such Response. This has not been noted in either the Opinion of the Supreme Court of Iowa or in the Opinion handed down January 21, 1981. The finding in each of these Opinions was that Randall was Myers personal lawyer.

The Opinion of the Supreme Court of Iowa and the Panel of this Court utterly ignores the background of the preparation of the Will. There was very substantial testimony during the hearing in relation to the type of a person Myers was. He was headstrong and there was no one that could influence him. This was set out in detail in Randall's Response, page 11, and utterly ignored in the Opinion. For no other reason, this should entitle Randall to a rehear-

ing because there certainly will be no basis upon which the Court could equate the action of Randall in preparing the Will for Myers and the action of Mr. Behnke in the drafting of the Wills for his two clients who were in nursing homes. This was specifically pointed out in the Response on pages 44 and 45.

It may be that Randall is misinterpreting the Opinion of the Panel of this Court but apparently the basis of the disbarment, as stated by the Court on page 5 of the copy of the Opinion which Randall has:

> "The Will was drawn by Randall and named Randall sole executor and sole beneficiary of Myers' estate, valued at over two million dollars."

Again and on page 13 the Opinion states:

> "The evidence produced, based in large part upon Randall's uncontroverted testimony, established that Randall on March 14, 1973, drew a Will for Lovell Myers, his business partner for over 25 years, in which Myers left his entire estate, conservatively valued at over two million dollars, to Randall."

There can be no question that the reference to the value of the estate was reference to value as of March 14, 1973. The record does not show

this to be the fact, in fact the record shows that this was not the fact. There is in the transcript the testimony of Mr. William O'Hara the vice-president of the Merchants National Bank through whom Mr. Gaudineer introduced the financial statement of Myers Farms, Inc. which had been signed by Mr. Lovell Myers as president of the corporation. A financial statement as of June 1, 1972, was in evidence as Exhibit 22. The uncontradicted evidence was that the values placed in the financial statements were the values placed by Lovell Myers. Exhibit 22, the financial statement of June 1, 1972, shows that the corporation had cash on hand and in the bank of $206.10. Mr. Myers showed the value of the real estate as being $3,190,705.50. A list of the real estate was attached to the financial statement.

There was also listed and attached to the financial statement certain Notes with respect to particular value which had been placed by Mr. Myers, on certain acreages, consisted of 30 acres which Mr. Myers valued at 5,000 an acre, acres which Mr. Myers valued at 4,000 an acre, 69

acres which Mr. Myers valued at $3,000 an acre. The 139 acres which were specifically mentioned as being of special value amounted to $551.500. The value of the remainder of the real estate would have, therefore, been $2,639,205.50. The total number of acres listed in Mr. Myers financia statement, Exhibit 22, would be 2,352.41 acres. One hundred and thirty-nine of those acres, according to Mr. Myers were of a value of $551,500 Therefore the balance of 2,213.41 acres would be of a value of $2,639,205.50. Therefore the 2,213.41 acres left would have been of the average per acre value of $1,192.37.

The properties which were valued by Myers in Exhibit 22 included the Hess 80 acres. Basing the value of the Hess 80 acres on the average price of the various properties, other than those specially priced, that is $1,192.37 per acre, that would mean that the Hess 80 would be valued at $95,389.60. Deduct this from the $2,639,205.50 would leave a balance of $2,543,815.90. In the list of properties valued by Myers there is a farm of 105 acres

described as "Chabal", this 105 acres was sold prior to the financial statement in 1974, Petitioner's Exhibit 23, for $84,000. The Chabal 105 acres was valued according to Mr. Myers in the financial statement, Exhibit 22, at $125,198.85. That property was overvalued by $41,198.85. This would therefore leave the value of the properties other than the special properties $2,502,617.05. According to Mr. Myers financial statement, Exhibit 22, 69 acres of the Kubick Airport land was valued at $3,500 an acre. This land was valued by a duly licensed appraiser, Donald Wehr in 1975, at $1,650 an acre. The 69 acres as valued by Mr. Myers at $3,500 an acre would total $241,500, the 1975 appraisal by Mr. Wehr at $1,650 an acre, would indicate that the 69 acres in 1975, was of a value of $113,850. Mr. Myers had therefore overvalued this land according to Petitioner's Exhibit 22, by $127,650, the value of the land, if we would assume that Mr. Myers valuation other than the one which is shown to be specifically wrong would be $2,926,467.55. If

we were therefore to use Mr. Myers inflated figures and assume that the other items are listed in the financial statement were properly appraised the total value of the Myers share of the real estate in the corporation in 1973 would only have amounted to $1,147,066.57. The record shows that for over 20 years Myers had been defrauding the corporation and cheating Randall to the extent that an investigation by a temporary administrator resulted in the Court ordering the transfer of the stock of Myers because the corporation had a lien on the stock as of July 19, 1979, in the amount of $441,677.87. There was no way in which it could be determined exactly how much Myers had taken from the corporation and Randall.

The Court can take judicial notice of the Iowa State University's Cooperative Extention Service Bulletins FM-1681, dated January 1976, and FM-1744, dated January 1978. These bulletins refer to an Iowa land survey , a study conducted by Duane Harris, Tim Lore, and Marjorie Groves under the supervision of Dr. William Murray of

Iowa State University, resulting from information gathered from real estate brokers all over the state of Iowa and complied in a report indicating the trends of agricultrual land in the state of Iowa. These bulletins show that high grade land in the east central portion of Iowa of which Linn County is a part, the average value of agricultural lands in 1973 was $895 per acre. It is significant that Myers sold the Chabal farm for less than $895 an acre, the Chabal farm would total $93,975. The land was sold for $84,000.

The foregoing illustrates the point that rather than the estate of two million dollars, it is doubtful that Myers had an estate of one million dollars, probably much less if one were to consider the monies which he had wrongfully taken from Randall and the corporation.

Further the figure of two million dollars is entirely ficticious and in no way is it supported by the facts. In arriving at a figure of that sort, it is necessary to ignore the fact that practically the entire value of

the Myers estate was in the stock in Myers Farms, Inc. At the time of the preparation of the Will, Myers had only a 50 percent interest in the stock, his operation of the corporation was such that the Internal Revenue audit disclosed that the corporation had sufferred a loss of approximately $400,000, in addition there was a bank debt shown on Petitioner's Exhibit 22, of $393,750. This debt was on Notes which were personally guaranteed by Randall and were subject to renewal every three months. Therefore the value which the Court should have considered would be the value of the stock. If the Court were to consider that the basic value of the land could be reached at all, it would obviously be after a dissolution action which would be expensive and time consuming, further Randall certainly would not have guaranteed the bank Notes if there were litigation attempting to dissolve the corporation, consequently the Court should consider the effect of having to sell some of the land at forced sale in order to pay off

the Notes. If the Court is going to disbar Randall because of the value of the Myers holding as of March 14, 1973, certainly Randall is entitled to have the value placed at a realistic figure and not at a ficticious figure

Theoretically, the Supreme Court of Iowa in its Opinion 285 NW 161, on page 165 states the Iowa law as follows:

> "It is complainant's burden of proof to establish the charge by convincing prepondence of the evidence. This burden amounts to less than is required in a criminal prosecution but is greater than is required in a civil suit.***"

To read the Opinion it will be difficult to believe that Randall produced any witnesses outside himself. According to the Supreme Court of Iowa, Randall could not be believed. The Opinion relies upon the hearsay statement of the daughter of Myers. The Opinion quotes statements allegedly made by Myers to his daughter with respect to facts. This became the basis upon which the Supreme Court of Iowa disbarred Randall. Thus the Supreme Court of Iowa found that Myers was truthful

in the statements made and his daughter was truthful in repeating such statements, no effort was made by the administrative agencies of the Iowa Supreme Court to find out the fact. The fact that Myers in collaboration with Morningstar defrauded the corporation and Randall out of hundreds of thousands of dollars is immaterial. The testimony of Morningstar is relied upon, not withstanding the fact that Morningstar testified that he had furnished Randall with false figures for his income tax returns since the purchase of the Hess property. These figures Morningstar admitted were false.

In addition the Courts ignore the testimony of Richard F. Nazette, former member of the board of Governors of the Iowa State Bar Association, who testified, as to the relationship between Myers and his daughter:

> "He had been estranged from his family for years. When I first went to Randall's office in 46", when I first became acquainted with Mr. Myers, he had been divorced and had been seperated from his wife, his former wife and his daughter, and through

the years that I was over there from time to time there would be talk about them and I believe, if I remember, he was brought into court a few occasions and there was correspondence back and forth. They were wanting more support or something he never spoke--in my presence, it was always unkindly toward them and he had no time for his former wife or for his daughter.***"(TR page 500, lines 12-24)

The Courts further ignores the testimony of Betty Truesdell with regard to the Will that Myers made in 1953, Exhibit S. At that time Mr. Myers by his Will left his daughter $500. The testimony was as follows:

"A: Well, as they were leaving the office, Mr. Randall said something to the effect is this something you want to do?

Q: What did Lovell say?

A: He said well, she didn't ever care about me, so.

Q: Do you know who he was referring to?

A: I think his daughter."(TR 472, line21-473, line 5)

The Courts have further ignored the fact that Mrs. Jensen testified that her father and Morningstar had punched holes in their linoleum. The testimony being as followed:

"Q: This hog episode that you talked about where your husband and your father had a disagreement.

A: Uh Huh.

Q: Was that in relation to whether or not they should have a pure bred boar on the place?

A: Maybe it was over pure bred stock, but I don't remember."(TR p. 66 line 20, p. 67, line 1)

Q: Do you remember the time he punched, he and Morningstar punched holes in your linoleum?

A: That was at that time, yes." (TR p. 67, line 12-14)

It is extremely difficult for Randall to prepare his Petition for Rehearing because his Response and Amendment to Response was submitted as a part of the four seperate appeals. He sought a Hearing En Banc for his Show Cause Response because he felt that he should be entitled to greater consideration, as indicated by the Ruffalo decision. He felt the rigid rules for the submission of the other appeals would not give him the type of fair hearing to which he should be entitled in the Response to the Show Cause Order.

There was an appeal from the Matter of the Suspension to Practice Before the United States District Court of the Southern District of Iowa, No. 80-1254, In the Matter of the

Suspension to Practice Before the United States District Court for the Northern District of Iowa, No. 80-1545, the Appeal from the United States District Court for the Northern District of Iowa in Randall's action against the individual justices of the Supreme Court of Iowa, being No. 80-1451. This was combined with No. 80-8117 which involved the response of Randall as to why his name should not be stricken of the roll of attorneys of the Court.

It was not fair to Randall or his Counsel to combine the four Matters which were submitted within the restricted time frame. The Opinion of the Panel shows a lack of understanding of the facts. It was not possible to cover all of the fact in the restricted time.

It is obvious that the legal principles involved in the question of Randall's suspension from practice before the United States District Courts of the Southern District of Iowa and the Northern District of Iowa would be different

than the legal questions involved in the action brought by Randall against the individual justices of the Supreme Court of Iowa, No. 80-1451. Further there would be a different obligation on the Court in the consideration of the Response of Randall in No. 80-8117. By consolidating all of these various appeals and writing one opinion, it is therefore necessary for Randall to consider the various implications of the opinion and point out to the Court that if the Panel had considered his Response and the Amendment to Response instead of ignoring it, the Panel could not have concluded to disbar him from the practice of law in the United States Court of Appeals for the Eighth Circuit.

From the opinion and the reference to the value of Myers estate, it would appear tha the Panel was misinterpreting the law as well as the facts with respect to values. The property of Lovell Myers on March 14, 1973, consisted in the main of an undivided one-half interest in a closed corporation Myers Farms, Inc.

The valuation of the basic assets of the corporation would not warrant the conclusion that on March 14, 1973, the Myers share would have been worth two million dollars, in fact it is doubtful that it would be one-half of that amount.

The Circuit Court of Appeals of the Sixth Circuit in the Laird vs. Commissioner of Internal Revenue, 3CAR, 1936, 85F 2d 593, held that a determination of fair market value of stock cannot be based upon the liquidating value where the owner is in no position to force a liquidation.

The Commissioner in the Laird case valued the stock of the two close corporations by taking the medium between the high and low point of the securities held in the portfolio of such closed company at the date of the death of the testator. In reversing the Court of Appeals at page 601 stated:

> "The stock in these two close corporations could not have been sold on the date of Mr. Laird's death, for no one could have forced a sale of all the stock constituting the assets of the

the Christaina and the Deleware Company. At least, the executor of Mr. Laird's estate could not have done it."

The stock in the Christaina Corporation stock which had a ready market and a fixed value. The assets of Myers Farms, Inc. was composed of mortgaged farm land. Therefore, to liquidate it would have been necessary to litigate. In addition there was a substantial bank debt secured by the signature of Randall. How would the corporation pay off these Notes if there was litigation and the Notes were called.

At the time Myers came to the office of Randall on March 14, 1973, to persuade Randall to permit him to continue the employment of Morningstar, Myers could not have forced a liquidation of the corporation without litigation. There was no basis therefore upon which the valuation of the basic assets of the corporation could have been used as a value of the stock belonging to Lovell Myers.

The Panel obviously misunderstood the fact.

The manner in which the Panel approached

the question of valuation is illustrated by a question which was asked during an oral argument at the time of the submission of the cause. Mr. Lashly in his argument, commented in substance, that during the progress of the litigation everybody got rich and Randall was disbarred. Mr. Justice Gibson questioned Mr. Lashly "Well he (Randall) has the twenty-five hundred acres." The oral arguments were reported and Randall believes that in fairness to him they should be transcribed so that the exact language could be considered by the Court En Banc and would illustrate the misconception of the Panel in regard to this value.

Randall at no time had twenty-fine hundred acres, he had an undivided half interest in the stock in a closed corporation. The valuation therefore is a valuation of stock and not of land.

In valuing the stock, the Court should take into consideration that during the time Myers had operated the corporation he had

built up a loss which was found by the Internal Revenue Service to approximately $390,000 at the time of the audit in 1973. This would certainly not indicate a valuation of two million dollars for one-half of the stock.

The opinion of the Panel refers to a conflict of interest, as follows:

> "Randall's disbarment in Iowa resulted from his actions, found to be a conflict of interest, in connection with drawing a Will for Lovell Myers and also for Randall's representation of Myers's corporate interest.***"

We assume that the comment about the drafting of a Will for Lovell Myers in relation to a conflict of interest was an inadvertant misstatement of the fact because the conflict of interest charge arose from Randall allegedly representing Myers's corporate interest.

In Iowa the disciplining of attorneys is to all intents and purposes the responsiblity of the Supreme Court. There is a committee on Professional Ethics and Conduct which receives complaints, processes the complaint, and then prosecutes the charge. This Committee

is described:

> "The Committee on Professional Ethics and Conduct of the Iowa State Bar Association, acting as commissioners of the Supreme Court as provided by Court rule 118,xxx." Iowa Rules of Court 1980, p. 473, Wr. 2-105 A(2) West Publishing Company. This is an arm of the Supreme Court.

The charge is prosecuted before a Grievance Commission, the members of which are appointed by the Iowa State Bar Association but these members must be confirmed by the Supreme Court of Iowa. However, the Supreme Court itself will discipline on its own motion, without recourse to the Grievance Commission (in re: Frerichs 238 NW2d 765(Iowa 1976).

The Court also has a commission entitled Client Security and Attorney Disciplinary Commission of the Supreme Court of Iowa. These groups appear to work together.

The charge of conflict of interest was apparenly built up in the Randall case because of the fear on the part of the interested parties that the charge arising from the alleged violation of EC 5-5 was not sufficient

to sustain the disbarment of Randall. The chairman of the Clients Secruity and Attorney Disciplinary Commission of the Supreme Court of Iowa, John H. Neiman, addressed the commissioners, this letter is a part of the record, the letter, reading:

> "At the last meeting of the commission, we agreed to recommend to the Supreme Court a rule to prohibit lawyers from preparing Wills in which they were named beneficiaries. It came out of the John Randall case in Cedar Rapids. I called Lee Gaudineer, Counsel for the Ethics committee, to check the language. Lee asked that we hold off recommending the rule for a short period of time because the Ethics committee is contemplating the filing of a complaint against John Randall, based upon the violation of Canon V of the Code of Professional Responsibility which states in part in effect that a lawyer should insist that in an instrument where a client wishes to name his lawyer his beneficiary, the Will should be prepared by another lawyer selected by the client and further states that a lawyer should not influence a client to name him as executor, trustee, or lawyer in an instrument. He says they have already submitted a similar case invloving another lawyer, and in both cases, if the Supreme Court would adopt the rule we recommend, the tendency would be to, in effect, be saying 'There previously had

been no such prohibition.' He does not object to the rule, but likes it, but he just does not want to take any changes on the two cases submitted.

Unless other members of the commission disagree, I'm inclined to acceed to Lee Gaudineer's request."

To the extent that the Ethics Committee, and the Client Security Disciplinary Commission were concerned whether or not the violation of EC 5-5 would be sufficient to sustain the disbarment of Randall, it is apparent that the Supreme Court of Iowa as well as the various committees, arms of the Supreme Court of Iowa, sought a charge which would sustain the disbarment of Randall.

The Morningstar case which arose out of the alleged forgery of a deed by Myers of 80 acres of land, was filed in April of 1974. The petition named as defendants the corporation, Lovell Myers, and Randall. The appendix in the Morningstar case is a part of the record in this appeal. The seperate answer of Myers Farms, Inc. contained allegations, as follows:

"This separately answering defendant denies that the plaintiffs acquired fee simple title to the real estate described in paragraph 3 and an affirmative defesne to such allegation state that the plaintiff Gilbert E. Morningstar was during the month of February and prior thereto an employee of this spearately answering defendant and of the defendant, Lovell Myers and John D. Randall, and that the plaintiffs were purchasing the property as agents and employees of the defendant and that financing of the said property was by the defendant and that to evidence the fact that their property was the property of the defendants, John D. Randall and Lovell Myers, the plaintiffs executed and delievered a warranty deed to John D. Randall and Lovell Myers, a copy of such deed is hereto attached marked Exhibit A and is by reference made a part hereof.

For answer to paragraph 4 this separately answering defendant states that as to whether or not defendant Lovell Myers, forged the signature of plaintiffs to a warranty deed this separately answering defendant alleges it is immaterial in that the plaintiff having already transferred title to the said property to John D. Randall and Lovell Myers are in no way harmed stat that there is a deed filed in the Linn County Recorders Office as is described in paragraph 4.***"

The foregoing quotation from the answer illustrates the fact that there was no pleading which in any way damaged or harmed Lovell Myers and further the record conclusively shows that up until the deposition of Lovell Myers December 20, 1975, Randall believed that

Myers had permission to sign the names of the Morningstars to the deed to the corporation and in every respect the interest of Randall and Myers were identical.

The Appendix in the Morningstar case further reflects the fact that Randall filed a cross claim quieting title based upon the early deed, that further on behalf of Myers he likewise filed a cross claim quieting title, that under the law of Iowa as it then existed the cross claims quieting title should have been first heard. That further the cross claims quieting title were ordered first heard, the order of Court August 27, 1975, being as follows:

> "Pursuant to hearing held before the undersigned on August 26, 1975, it is hereby ordered that the quiet title action set forth in the cross claims of defendants Lovell Myers and John D. Randall be first tired herein. Said quiet title action is set for trial commencing at 9:00 a.m. on November 13, 1975."

See 75AM. JUR. 2d "Trial" section 7, at page 125, which states:

> "Where both legal and equitable issues exist in an action, that should

be severed and the equitable issue tried first by the Court."

See also Holmen vs. Wahner 268NW 168 at 170.

✓Dated this 27th dayŏ of August, 1975. Signed August F. Honsell, Jr. Judge, Sixth Judicial District of Iowa.

It was the foregoing order from which the appeal was taken and Randall respectfully states that there could be no conflict of interest to and including the 27th day of August, 1975.

The sequence of events in relation to the appeal reflect the fact that the appeal was argued in April of 1977. The complaint against Randall was filed in May of 1977, and the Morningstar appeal was decided June 29, 1977

The Morningstar case itself was not the statement of the Law of Iowa. The Supreme Court of Iowa in the State vs. Simmons decided March 19, 1980, 290 NW2d 589, on page 594, stated:

"As noted in Morningstar, our rules provide for splitting the issues where some are triable at law and some in equity. Trial of the equitable issues first is the rule rather than the

exception. In Morningstar, we held there was compelling reason to try the law issues first because that course would likely dispose of the whole case. That is not true, and the trial Court properly exercised its discretion in determining the order of Trial."(Emphasis supplied)

If a Court would wish to make an assumption, as the Supreme Court of Iowa did in Randall's case, a convincing argument could be made that the charge in the law of Iowa was for the purpose of disbarring Randall. Where the record discloses without contradication that Randall was the one defrauded by Morningstar and Myers, there is no basis upon which Randall could be charged with Conflict of Interest in the Morningstar case.

The Panel emphasises the fact that Randall placed Myers' Will in his private desk drawer. While Randall has sought an opportunity to have a hearing before a Judge not in any way connected with any Iowa Courts or Judges, he is apparently not being given an opportunity to show the facts. There is great emphasis placed upon the fact that the Will was placed in a desk drawer and locked. The fact is that

this desk drawer was the repository of various items for Myers, at the request of Myers. There was all of the stock in the corporation belonging to Myers, there were all of the audits and various tax items bearing on the corporate operation, these were in this particular drawer at the request of Myers. There were also records of corporate refinancing.

At the time of the preparation of the Will, the discussion between Myers and Randall was with reference to the continuation of the employment of Morningstar, the corporation itself had just gone through another audit, there was a very substantial indebtedness to the Merchants National Bank on which Randall was personally liable, Randall had his practice which gave him concern, his wife was ill, and now he is being disbarred because of the fact that he forgot that he had the Will. Myers lived for three years after the making of the Will and Randall is being pilloried because of the fact that he did not remember an incident which occurred three years before the death

of Myers. Obviously the Supreme Court of Iowa could and did do this but there was certainly no justice in such a holding.

The Panel, apparently as one of the grounds for the disbarment of Randall states:

> "Mrs. Jensen subsequently filed a suit contesting the Will. Randall settled the suit for approximately 1½ million dollars."

There is no mention of the fact that in the original Opinion which was sent out by the Supreme Court of Iowa, the Supreme Court of Iowa said:

> "Randall paid Marie $35,000 and conveyed clear title to a farm.***"

The Supreme Court corrected this statement by in the Opinion which appears in 285 NW2d at page 161, at page 163 the Opinion reads:

> "Randall paid Marie $700,000 and conveyed clear title to a corporate farm."

This is mentioned because it illustrates the comment made by Hugo L. Black, Jr. when he said:

> "The Iowa Bar--with the approval of the Iowa Supreme Court--in the Process of Getting Behnke***"

In the process of getting Randall, the Supreme Court of Iowa was prepared to and did use any tactic which would accomplish this result.

Randall believes that this Court En Banc should take cognizance of the rule announced in North Carolina vs. Pearce 395 US 711, 23LA 2d 656, 89 S. Ct. 2072 where the Court through Justice Stewart (23LA 2d 669) observed:

> "Due process of law, the, requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial. And since the fear of such vindictiveness may unconstitutionally deter a defendant's excercise of the right to appeal or collaterally attack his first conviction, due process also requires that the defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing Judge."

In Blackledge vs. Perry 417 US 2140 L. Ed. 2d 628, 94 S. Ct. 2098, this rule was applied to the prosecuter.

The settlement made by Randall of the Will Contest action was not a settlement of the Will Contest, it was a settlement to dispose of the complaint which was filed, it

was a payment made, without regard to values, to dispose of any question which was created by the filing of the Complaint. Randall believed at the time of the settlement and still believes that there was not legal basis upon which an unbiased Court would have permitted the Will Contest case to have been considered by a jury. Mr. Napier told Mr. Wendt that the complaint had been filed in order to force settlement. The amount paid bore no relation to the value of the estate nor to the Will Contest. It was the sincere belief of both the lawyers for Marie Jensen as well as the lawyers for Randall and Randall that by settling the Will Contest the complaint would be dropped. It was Mr. Gaudineer, the Ethics Committee and possibly some of the other individuals who were on the Supreme Court Committee or any of the Supreme Court of Iowa Administrative Agencies who continued the persecution. This is evidence is and of itself of the vindictiveness.

There is further evidence of the

vindictiveness of the Ethics Committee, Randall was invited to meet with a sub-committee of the Ethics Committee on September 12, 1977, to discuss the alleged violation of EC 5-5. He went to Des Moines, Iowa, and met with Mr. Gamble, chairman of the Ethics Committee, Hedo M. Zacherle, Ethics Administrator, Lee H. Gaudineer, Jr., Ethics Counsel and a Thomas A. Finley (Appendix in the Supreme Court of Iowa, page 15). This fact is not in any way denied and the copy of the letter by Randall to Mr. Gamble which appears on page 16 of the Appendix confirms this belief.

Notwithstanding the fact that no mention had been made on any other complaint than the violation of EC 5-5, Mr. Gamble chairman of the Ethics Committee swore to the complaint against Randall on the 18th day of October, 1977, such complaint being in two counts. A copy of this complaint is Exhibit B attached to the Petition for Declaratory Reflief which was filed February 1, 1980, with the Clerk of the United States District Court for the Northern

District of Iowa which cause was appealed to this Court, being No. 80-1451.

The evidence of this vindictiveness was carried further when Mr. Gaudineer came to Randall's office early in November of 1977, and without in any way advising Randall that there was a complaint against him based upon Conflict of Interest, was given any and all files which he requested. He examined these files. This was known by the Grievance Commission and by the Supreme Court of Iowa. The fifth defense to the complaint, raised this issue. The fifth defense appearing on page 25 of the Appendix and reading as follows:

> "That the attorney for Complainant engaged in deception and misconduct depriving Respondent of procedural due process by coming to Respondent's office, discussing the complaint with Respondent, requesting information from Respondent, reviewing Respondent's books and files, and generally representing himself as an investigator, when in fact, prior to that time, said attorney had drawn and finalized the complaint against Respondent and had had it sworn to by the chairman of the Committee on Professional Ethics and Conduct of the Iowa State Bar Association. Respondent was not informed in any way of said circumstances, warned of his rights, or advised that said attorney was acting

> as a prosecuter hunting evidence rather than as an investigator hunting information; and such actions on the part of Complaintant warrant dismissal of the Complaint."

That the foregoing fifth defense was never denied.

In the Response filed by Randall comment was made with respect to the various misstatements of the Supreme Court of Iowa in its Opinion. The Panel points out the fact that Randall was denied discovery against the justices of the Iowa Supreme Court:

> "We have reviewed the record and find that the interrogatories presented to those individuals were in attempt to attain the mental impressions of the commission and of the Court in the dedision making process.***"

Justice David Harris of the Iowa Supreme Court was the one who prepared the written Opinion. The Opinion contained many slanted conclusions and erroneous statements of fact. It is respectfully suggested that there was no attempt to secure from Judge Harris any mental impressions. Interrogatories numbers 5 and 6 requested information with respect to

research assistance. Numbers 9, 10, and 11 related to the method of selecting the justice to write the Opinion. Interrogatory 24 had references to the Opinion which was mailed wherein Justice Harris stated that Randall had paid Marie Jensen $35,000. Interrogatory 26 requested information with respect to the Application and the Amendment to Application filed by Randall seeking an order of Court permitting him to take a deposition of the chairman of the Ethics Committee, Lee H. Gaudineer, and other. At the time the interrogatories were presented to Justice Harris, he was aware that the gentlemen named had met with Randall on September 12, 1977, and mislead him with respect to the basis of the complaint and later John Gambel had sworn to a complaint in two counts, one count bearing upon conflict of interest. This was not an attempt to secure any of the mental processes of the justices. Interrogatory 36; an inquiry was made with respect to the language relating to the conflict of interest. This

is an inquiry with respect to fact and not mental operation.

Interrogatory 41 is a direct inquiry with respect to whether or not the facts before the Court did not present a continuing claim that Randall's right to Due Process was violated.

Interrogatory 42 refers to the language in the Behnke case having to do with the violation of Ethical Considerations. This is solely an inquiry with respect to the facts. Interrogatory 44 quotes a certain language in the Bahnke case and the inquiry is as to whether or not the cases cited in the Behnke decision were cases which involved not only a violation of Ethical Consideration but violatio of disciplinary rules and also the fact that the earliest of the five cases cited in the Behnke decision as authority that a lawyer should be disciplined for violation of Ethical Consideration was in 1974.

No useful purpose would be served in considering the other interrogatories which

were addressed to Justice Harris and the other individual members of the Iowa Supreme Court but certainly the record indicates that there had to be a violation of the constitutional rights of Randall, and Randall certainly should have been entitled to find out from the individual justices what facts were investigated in relation to the statement of the Court in its orignial Opinion that "Randall paid Marie Jensen $35,000", this would be particularly true when in the final Opinion the figure was changed from $35,000 to $700,000. In addition there was a misstatement of facts in the Opinion. In determining that Randall was guilty of a conflict of interest, the Supreme Court of Iowa made an absolute misstatement of fact, Committee on Professional Ethics vs. Randall 285 NW2d 161 at 163:

> "When Morningstar brought suit Randall entered an Appearance and filed motions for Myers. He also initiated an innerlockatory appeal to this Court."(Emphasis supplied)

The Morningstar Opinion 255 NW2d 159, the headnote states:

> "Action was brought for compensatory and punitive damages for alleged fraud in certain dealings involving title to a farm. Defendants filed a cross claim asking that the title to the real estate be quieted in them. The Linn District Court, August F. Honsell, Jr., Judge, seperated the cross petitions to quiet title from the main action and ordered the quiet title action tried first. Plaintiff's Appeal.***"

The inquiry made by the interrogatories sought the facts with respect to that particular misstatement in the Opinion. It is inconceivable that a litigant should be prevented from making inquiry of any Judge when there has been an absolute misstatement of fact and where that misstatement is the basis of a very severe penalty. That is the effect of the Opinion of the Panel,

In the very detailed and extensive Brief filed by the United States District Attorneys for the Northern and Southern Districts of Iowa and Mr. Gaudineer and his staff in support of the Decisions of the United States District Courts for the Northern and Southern Districts

of Iowa it is said:

> "The Lawyer Disciplinary Procedure of the Iowa Supreme Court is seperate and distinct from the Iowa State Bar Association. It is Court Rule 118(Addenda): The Committee on Professional Ethics and Conduct first acts(in substance) as a grand jury to determine if charges should be brought."(P. 30, Brief and Argument)

In Iowa when a person is indicted by the Grand Jury, the indictment shall be presented to the Court with the minutes of evidence of the witnesses relied on. The indictment, the minutes of the evidence, and all exhibits shall be filed with the Clerk(Iowa Rules of Criminal Procedure Rule 4-(5). Randall was prevented from securing any information relative to what transpired before the Ethics Committee by the refusal of the Iowa Supreme Court to permit discovery. In fact, there is nothing in the record to show that the Ethics Committee authorized the filing of the Complaint.

Further the Iowa Supreme Court in disciplining Randall took the hearsay testimony of the daugher of Myers and her family wherein she quoted statements by her father.

The record showed without contradiction that the individual whose statements were quoted by his daughter and her family had been cheating Randall and the corporation for a period of over 20 years, Morningstar, the other individual whose testimony was believed by the Iowa Supreme Court, was the one who admitted falsifying the figures which he gave to Randall so that Randall might prepare his income tax returns. These are the witnesses relied upon by the Supreme Court of Iowa in disciplining Randall. When Randall sought to get the facts, as distinguished from the mental operation, the Panel in its Opinion said that these are sacrosanct. In effect the Opinion holds that when a lawyer is disciplined, it makes no difference as to the basis upon which the Supreme Court may displine, that lawyer has no protection. The Opinion of the Panel places the stamp of approval of these tactics by the Iowa Supreme Court.

The implication of EC 7 is that a lawyer

must be accurate the entire subject of EC 7 has to do with the lawyer being absolutely frank and, under no circumstances, misstating the law. In fact EC 7-23 places an obligation on a lawyer to advise the Court of unfavorable law, the language being:

> "Where a lawyer knows of legal authority in the controlling jurisdiction directly adverse to the position of his client, he should inform the tribunal of its existence unless his adversary has done so.***"

Justice Harris in his Opinion states:

> "When Morningstar brought suit, Randall entered an appearance and filed motions for Myers. He also initiated an interlocutory appeal to this Court." (Committee on Professional Ethics vs. Randall 285 NW2d 161-163).(Emphasis Supplied)

This is false and if a lawyer, either before the Trial Court and or Appellate Court had made such a representation, he would have surely been subject to discipline. There is not a word in the Opinion about Randall having filed on behalf of Myers and himself a cross claim quieting title. If the Supreme Court of Iowa had not prevented this issue from

being tried in equity, Randall believes that he and Myers would have been successful in quieting title. This was the ground upon which the Supreme Court of Iowa disbarred Randall because of a conflict of interest. There could not have been a conflict of interest if the facts had been set out correctly. The decision of the Panel preventing Randall from interrogating the justices with respect to the facts places Randall in the position of being prevented from properly presenting his appeal and therefore Randall should be entitled to have the Court hold that the Supreme Court of Iowa and the United States District Court for the Northern and Southern Districts of Iowa acted in a manner that precluded all resort to Appellate or other judicial remedies.

The Opinion of the Panel places great emphasis upon large sums of money. For instance the value of Myers estate which as has been previously demonstrated was not the fact. That figure was stated in the Opinion of the

Panel as follows:

> "Mrs. Jensen subsequently filed a suit contesting the Will. Randall settled the suit for approximately one and one-half million dollars."

This figure must have been secured from the testimony of Mr. Lloyd Wolf, a member of the firm of Napier, Wright, and Wolf of Fort Madison, Iowa.(TR 1, page 156)

It should be noted that Mr. Napier, the gentlemen who told Mr. Wendt that the Complaint had been filed in order to force a settlement of the Will Contest, was present but was not called as a witness.

The record being:

> "Mr. Klay; Mr. Gaudineer, it's the ruling of the Commission that this hearing is a closed hearing; that Mr. Napier could not be present except with leave or at the request of the Respondent, and therefore I will have to ask you that he leave."(TR I, page 27)

EC 7-13, reads:

> "The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict. This special duty exists because: (1) The prosecuter represents the sovereign and therefore should use restraint in the discretionary exercise of governmental

> powers, such as in the selection of cases to prosecute; (2) During trial the prosecuter is not only an advocate but he also may make decisions normaly made by an individual client, and those affecting the public interest should be fair to all; and (3) In our system criminal justice the accused is to be given the benefit of all resonable doubts. With respect to evidence and witnesses, the prosecuter has responsibilities different from those of a lawyer in private practice: The prosecuter should made timely disclosure to the defense of available evidence, known to him, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment. Further, a prosecuter should not intentionally avoid pursuit of evidence merely because he believes it will damage the prosecuter's case or aid the accused."

When Mr. Napier appeared at the time of the hearing, Mr. Gaudineer was aware of the fact that Mr. Napier had told Mr. Wendt that the complaint was filed in order to force settlement. It was certainly his obligation not only as a prosecuter but also as a lawyer under EC 7 to advise the tribunal of that fact. This was not done.

The figure of one and one-half million dollars must have been from the testimony of

Mr. Wolf the partner in the Napier firm who testified as follows:

> "Q: What then was the determination as to the case value of this transaction to your client, Marie Jensen?
>
> A: Our determination as to the total value was one million five.
>
> Q: One million five hundred dollars, I'm sorry."(TR I, page 164)

Since this had been a matter of some significane to the Iowa Supreme Court, in the action against the individual justices of the Iowa Supreme Court, Randall who had previously been informed that the fee of the Napier firm was $350,000, sought to take the deposition of an office of the Merchants National Bank in Cedar Rapids, Iowa, for the purpose of securing the checks or bank drafts having to do with the amount which was paid the Napier firm at the time of the settlement with Marie Jensen, this inquiry was arbitrarily denied by the Magistrate of Northern District of Iowa and before there could be further proceeding, Randall's Petition was dismissed.

The ruling was arbitrary and unjust. It further reflects the fact that at no time has there been any attempt to secure all of the facts.

Mr. Johnson of the Panel made further inquiry of Mr. Wolf and the following record was made:

> "Q: Alright, in addition to the $700,000, she got this 160 acres you say free and clear?
>
> A: Yes.
>
> Q: What was the total dollar value of the 160 acres?
>
> A: I believe $240,000.
>
> Q: In other words, $940,000?
>
> A: Yes.
>
> Q: But is the difference between that and the one million five?
>
> A: Well, I don't have the exact figures on it but Federal Estate Tax would be around a half a million which Mr. Randall paid, then the Inheritance Tax, and then cost, and I don't have those exact figures, but those are calculated into the settlement.
>
> Q: But by receiving it tax free you feel that the total to her had she inherited it, would have been at one million five?

A: Yes.(TR 1, page 170, lines 5-23)"

The fact is that probably the combination of the settlement, the other costs created by the fact that during the probate of the Myers estate, the Probate Court in Linn County Iowa convicted Randall and found him guilty without a hearing. A recitation of the sequence of events shows this conclusively. A co-executor was appointed by the Court and was permitted to select its own Counsel. The co-executor and the attorney for the co-executor took over the matter of the filing of the Federal Estate Tax return and refused to accept the suggestion of Counsel for Randall that an Application be made for permission to extend the time for filing the Federal Estate Tax return and in the return so filed the value of the shares of stock in Myers Farms, Inc. was shown as being "undetermined". This resulted in the assessment by the Internal Revenue Service of a total of failure to file penalty in the amount of $171,165.85 and a total of failure to pay penalty in the amount of

$9,593.15.

The co-executor and Counsel for co-executor showed a substantial number of hours working on the Federal Estate Tax problem.

Following the settlement of the Will Contest action, the co-executor and its Counsel submitted a very substantial bill for services which was resisted by Randall. The Probate Court of Iowa thorugh Judge Osmondson was so impressed with the resistance that he allowed Counsel for the co-executor $1,000 more in attorney fees than had been requested.

Randall as executor for the Myers estate computed the net value of Myers estate at $888,242.

The liabilities were noted at $1,290,561.00 which included the mortgage and miscellaneous debts incurred during the crop years previous to 1976. Theirs had not yet been paid at the time of Myers death(TR page 584).

The evidence further reflected the fact that Randall and his office knew nothing about all of the claims. The following

inquiry by Mr. Keith, of Mr. Jon McCright a witness for Randall, reflects this fact:

> "Q: I don't quite understand why you are having such a problem either determining assets or determining values. What did you say the reason was that you couldn't reach any reasonable value on these?
>
> A: Well, first of all, we didn't know the extent of all the claims. We didn't know all of them outstanding. I think at a later date, just to tell you briefly why we didn't know, after we filed this, F. J. Krob is a large grain and fertilizer dealer here and he came into the office one day and said, well, I have a bill for eighty some thousand dollars and Mr. Randall knew nothing about. There was also a bill from International Harvestor for the purchase of a new tractor, I think, things like this just kept cropping up. We didn't know what the total liabilities of the corporation were."(TR page 576, lines 8-22)

Randall was forced to appeal to the Tax Court for the purpose of attempting to eliminate the penalty and in settling with the Tax Court was forced to agree to a valuation of the stock that was not realistic.

Undoubtedly if all of the costs which Randall incurred because of his association Myers, including the burdens which were placed

upon him by virtue of the fact that the Probate Court of Linn County Iowa, condemned him without hearing all of the facts, the cost to him to try and protect his undivided half interest in the corporation and in the property would far exceed two million dollars. This without considering the loss sufferred by Randall because of the revocation of his license. It would be difficult to find a clearer example of taking property without due process of law than what has transpired during the prosecution of this disciplinary proceeding.

The misconception of the Panel is illustrated by the language immediately following page 13 of the written Opinion. Page 14 the Panel seeks to interpret the clause "exceptional circumstances" did not apply means that the Iowa Court and the Panel sought in 1979 and 1980, and 1981, to interpret what occurred in 1973. Apparently exceptional circumstances, according to the Panel, would depend on "the amount of property involved."

There is no suggestion in the Opinion as to whether this "amount of property involved" meant in 1973 or 1976. The second ground is "that Myers had a living daughter and two grandsons,***". There is no mention of the fact that Myers did not attend his daughter's wedding(TR page 109) nor that he didn't attend his grandsons wedding.(TR page 109) There is no mention about Bernice Lasson a school teacher at Praire School who lived with Myers 20 or 30 years continuously(TR page 263-264). The Panel ignored the part of the testimony relating to the fact that Bernice the shcool teacher who lived with Myers was given Myers life insurance policy and that Randall was made alternate beneficiary, nor that Myers and Bernice Lasson had a joint savings account(TR page 64). The statement with respect to the contention of Randall utterly ignores the testimony which indicates that the purpose of Myers coming to Randall's office was to inform Randall that Myers was going to keep Morningstar. The particular

testimony being:

> "Well, my recollection is that I said or said in substance that I think you will regret keeping to--I mean, I think he (Myers) said, he prefaced his (Myers) remark by first saying he had notified Marie and Warren that they were not to come up. I mean, that's in substance. I think that's what he said, and that he was going to keep the Morningstars and I said why. He said I've got my reasons, and I said what are they, and he said I will tell you or tell you later or something and I said gee, I think you're going to be awfully sorry about this, Lovell, keeping that fellow after what he has done to you.
>
> Then he said I've got my reasons and I said well, I don't like it very well because I said, you know, I think it's a big mistake and he repeated again, 'I've got my reasons', and as I remember possibly a third time I said well, don't you want to think it over something, you know.
>
> I was very anxious that he not go through the trauma of having that fellow around all the time. I thought it would be bad for him and finally he says, 'what the hell, I'm going to leave you all my property anyway", words to that effect. And then sometime or another again he, you know, said if you die first, you can still continue farming, and I think that was about the end of it as I remember it.***"(TR page 703-704)

The only reasonable inference which could be drawn from that testimony and by what had

happened at the time Myers came to Randall's office March 14, 1973, was that the purpose of the trip was to persuade Randall to permit him to keep Morninstar as an employee of the corporation. It is obvious that the matter of the Will was merely a ploy to enable Myers to get his way. The language in the Opinion does not correctly recount the facts and the basis upon which Randall could well believe that there were "exceptional circumstances". The most desperate criminal has been given a better hearing and more consideration than Randall has been given either by the Supreme Court of Iowa or its administrative committees, that is the Ethics Committee and the Grievance Committee.

The Panel ignored the fact that Myers in his financial return, Petitioner's Exhibit 22, the financial statement of June 1, 1972, and Petitioner's Exhibit 23, the financial statement of 1974, continued to list the Hess farm as belonging to the corporation.

At the time of Myers death, Randall was

the holder of an undivided one-half of the stock in the corporation, he was personally obligated on all of the mortgages, he was personally obligated on all of the bank loans.

Probably the most shocking portion of the Opinion of the Panel relates to the lack of bias on the part of the Grievance Commission. If the Court were to start with the Opinion of the Grievance Commission which consisted of a vicious attack on Randall coupled with a recommendation for disbarment and no reinstatement, and considered further the statement by Mr. Keith prior to the challange to the Panel by Randall that he would consider any alleged breach of ethics whether contained in the Complaint or not(App. p. 264-265) and would review the questioning by the Panel some of which was objected to by the Counsel for Randall, there could be no basis upon which the Court could state that this was not evidence of bias and evidence of vindictiveness. While the President of the Panel stated that the Panel should not consider evidence other than evidence

material or relevant to allegations or charges contained within the Complaint, none of the members of the Panel voiced any agreement with that admonition, the very decision of the Panel would indicate that such admonition had not been followed.

The attitude of the Panel contrasts to the attitude of the Second Court of Appeals in celebrated case United States vs. Maurice Stans. Ruling upon a Writ of Mandamus in a challenge to the Trial Court for failure to extend the time for beginning of the trial, the Circuit Court said:

> "In a prosecution of this sort, which will receive nation-wide attention, it is particularly important that justice not only should be done, but should seem to be done. While the high positions formerly occupied by the Defendants entitle them to no more consideration than is accorded the ordinary citizen, they deserve no less."(Maurice H. Stans, "The Terrors of Justice", page 333)

It is significant that in the Stans trial the Judge instructed the Jury about a witness who has admitted to false statements under oath. The instruction being:

"Now, the testimony of an admitted perjurer should be considered with caution and weighed with great care.

You may decide, for example, that an admitted liar is unbelieveable or, conversely, you may accept his testimony. The question, again as always, did the witness testify truthfully before you, and the question of credibility is for you and you alone to decide."(Maurice H. Stans, "The Terrors of Justice", page 332 and 333)

Mr. Stans was fortunate in two respects, first the Judge told the jury that Mr. Stans was presumed innocent until proven guilty and second there were sufficient monies in the Campaign funds to help him some, in the payment of the cost to him of his defense. While Randall acknowledges with gratitude the fact his friends Oscar Fendler, John Jaqua, and John Lashly have represented him in the Eighth Circuit Court without charging him for their fees, the expense of his defense has been burdensome.

The witness, Morningstar, admitted that he answered falsely with respect to the settlement of the sale of certain property, wherein Randall had accounted fully for all

all of the money that had been received. This was brought out on cross examination and such cross examination clearly showed that Morningstar had not been truthful in his deposition or his charges against Randall (App. page 196-205).

The evidence of Morningstar further showed that Randall had been preparing the tax tax returns for Morningstar since prior to 1956, and from the time Morningstar claims that he had purchased the Hess Eighty. There is one portion of Morningstar's testimony that was ignored by the Grievance Commission, the Supreme Court, as well as the Panel, that is a question and answer as follows:

> "Q: Did John Randall exert any influence over the actions that Lovell Myers would take?
>
> A: Not to my knowledge."(App. page 246)

Morningstar also testified that from the time he purchased the Hess Eighty, unitl 1973, all of the taxes, the insurance, the fertilizer, the seed, the cost of preparing the land and

harvesting the crop had all been paid by Myers Farms, Inc., this in addition to paying off the mortgage and paying all of the interest. The Supreme Court of Iowa in commenting upon the fact that the Morningstar case involved fraud, was certainly correct, that is Randall was defrauded. Mr. Morningstar sold the Hess Eighty, November 2, 1979, for $271,600,(Linn County Recorders Office, Vol. 1804, p. 216), this sum plus the $100,000 paid Morningstar from the Myers estate gave Morningstar a tidy profit for falsifying his Income Tax Returns. This is true even if the dollars are the thirty six cent dollars, which were described by our President. If the Supreme Court had permitted Randall and Myers to prove up their quieting actions, it is inconceivable that an equity Court would not have quieted title upon learning that Morningstar had falsified his Income Tax Returns to deceive Randall.

The Grievance Commission and the Supreme Court of Iowa were aware of all of these facts and utterly ignored such facts.

Under all of the circumstances the language of the Panel:

> "The members of the Grievance Commission individually asked a number of questions of the witnesses. Randall complained of the members' activity in this regard and alleges that it demonstrates a bias against him. We think to the contrary that it demonstrates the Commissions' interest in actually trying to ascertain the true facts of this somewhat complex interplay of human emotions and personal interests covering an adult lifetime of activity.***"

The Complaint by Randall involved not only the asking of these questions but objected to the form of the questions as well as the subject matter of the questions which extended far beyond the area of the Complaint. The objection of Randall was to the fact that the Panel of the Grievance Commission acted as part of the prosecution. The attitude of the Panel was truly Russian, that is Randall was quilty until he was proven guilty. Nothing is said about this.

At the time Randall was confronted by the members of the Napier firm he was in the process of learning more and more about the

fraud that had been committed on him by Myers and Morningstar. He had an undivided one-half interest in the stock of a corporation which owned a substantial number of acres of Iowa farmland all of which was heavily mortgaged. He was personally liable on each of these mortgage notes. He had been receiving other bills on account of items charged by Mr. Myers and owed by the corporation about which he had no knowledge, he was personally obligated to the Merchants National Bank in the amount of $185,000,(see 1976 financial report). The amount owed the Merchants National Bank was on demand notes which necessarily had to be renewed every three months. The corporation was in jeopardy and he was personally in jeopardy. When the members of the Napier firm came to his office, he offered to allow them to take over the probate providing that they would make an honest effort to work out what ever amount had been wrongfully taken by Myers. This they refused to do and further they insisted

on participating in the operation of the corporation. This Randall refused. He was personally obligated on the corporation notes and there was no offer to share this responsibility. The Grievance Commission knew what had been done, they had the temporary administrator whose report was approved by the Court and the claim allowed.

During the probate of the estate the Probate Court of Linn County, Iowa, cooperated with the Will Contestant lawyers. The attorneys for the co-executor made application in June of 1977, for the allowance of fees. In the hearin on the Application the attorneys for the Will Contestant sat on the same side of the counsel table with the attorney for the co-executor and supported the position of the attorneys for the co-executor. The Probate Court allowed the fees requested.

Finally during the process of the probate estate without in anyway complying with the law with respect to the removal of the executors, the Probate Court of Linn County,

Iowa, removed Randall as executor. Further when Randall finally settled the Will Contest action in order to settle the Complaint, application was made by the co-executor, the accountant, and the attorneys for the co-executor for the allowance of fees and the co-executor, the attorney for the co-exeuctor, and the account were allowed total fees and expenses in the amount of $28,013.49. The co-executor and his attorney in preparing the Federal Estate Tax which was held to be no Estate Tax return had caused a penalty in the amount of over $180,000, to beassessed against the estate, this caused the estate imeasureable harm and in working out a settlement of the penalty, Randall was forced to agree to a value of the stock which he believed to be in excess of the true value of the stock. Further in valuing the stock, the Internal Revenue Service counted the claim of the corporation because of the fraud practiced on it by Myers, which was allowed by the Court in the amount of $441,677.87, as of July 19,

1979, as an asset of the corporation. For these services the co-executor and their attorneys were allowed fees and expenses in the amount of $21,198,49.

In the notes to the preamble to the Code of Professional Responsiblity, there appears the following language:

> "A state cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment.***
>
> An accused lawyer may expect that he will not be condemned out of a capricious self-righteousness or denied the essentials of a fair hearing.(Note 8, p. 3-Annotated Code of Professional Responsibility, American Bar Foundation)"

Randall did not have a fair trial or a fair hearing, Randall did not recieve due process or equal protection. The settlement plus all of the way in which he was penalized by the Grievance Commission and the Iowa Supreme Court, coupled with the Supreme Court of Iowa changing the law of Iowa in the Morningstar case, far exceeded the value of the Myers estate.

The Eighth Circuit Court of Appeals is apparently now adopting the Iowa Supreme Courts position that lawyers may be disbarred for violation of Ethical Consideration. Since this will affect all of the lawyers in the Eighth Circuit, it would seem that certainly the Eighth Circuit Court En Bank should make this determination. The note in the Iowa Law Review, Vol. 65, No. 5, July, 1980, commencing on page 1386, discusses "Lawyer disciplinary standards; Broad and Narrow Prosecutions: At page 1397, Note 88, the author comments:

> "The mandatory application of the ethical consideration against Iowa attorneys who have been accused of misconduct will have a significant impact on the practice of law in Iowa. A sampling of the ethical considerations in the Code indicates that Iowa attorneys are now presumably bound to a number of new standards***
>
> The Court, however, has not indicated whether all 138 ethical considerations may be the basis for disciplinary action."

If the Court does finally determine that the violation of Ethical considerations will be sufficient to disbar, then Randall was not

given equal protection of the law, because others who violated Ethical Considerations were not punished.

The firm of Napier, Napier, and Wright violated Ethical Consideration No. EC 7-21, for the reason that they used the Complaint for the alleged violation of Ethical Considerations as the basis of coercing settlement of the Will Contest case. While EC 7-21 refers to the "criminal process," the action by the Napier firm in causing the filing of the Complaint against Randall was a serious as the threat of criminal prosecution. If there is to be equal protection of the law, then the Eighth Circuit Court of Appeals should certainly cause an investigation to be made and proper punishment imposed for such violation.

Further Mr. Gaudineer in coming to the Randall Law Office at a time when he had prepared and sworn to a Complaint relative to conflict of interest should be held to violated sections 610.15 and 610.24* relating to deceit as well as EC 7-13 referring to the duties of

of the public prosecuter.(*(3)(4)I.C.A.)

Further Mr. John Gamble, Mr. Hedo Zacherly, Mr. Finley, and Mr. Gaudineer violated sections 610.15 and 610.24(3)(4)I.C.A., in that what was done at the time Randall appeared on September 12, 1977, and was not informed that there was to be a complaint to be based upon conflict of interest, constituted deceit. If the Eighth Circuit is to punish for violation for Ethical Considerations then under the provisions of the United States Constitution the Court should call these lawyers to be investigated and should then punish these gentlemen for the violation of the Ethical Considerations.

Randall further submits that there is no way in which it can be determined whether he was given equal protection of the law until after the decision of the Supreme Court of Iowa in his case.

Since the Panel has obviously overlooked various facts in the record and has thus in its Opinion not properly applied the law,

Randall is entitled to a rehearing En Banc. Randall's only other request has been that this honorable Court assign a Judge from outside of Iowa who is not in any way connected with or would be influenced by any of the Iowa Judges or lawyers so that he may have an opportunity to make a showing with respect to all of the various matters involved which he is convinced will exhonorate him.

Respectfully submitted,

G

ON FEBRUARY 27, 1979, THE FIRST DIVISION OF THE GRIEVANCE COMMISSION OF THE SUPREME COURT OF IOWA FILED THE FOLLOWING:

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION

This matter came on for hearing pursuant to order on November 14, 1978, at 10:00 a.m. in a Court Room in the Linn County Court House in Cedar Rapids, Iowa, before the First Division of the Grievance Commission consisting of Earl T. Klay, President; Craig L. Johnson; Kenneth L. Keith; Max R. Teske; and David L.

Hammer; all of whom were present throughout the hearing. Said hearing was concluded on the 21st day of November, 1978.

The complainant appeared by its counsel, Lee H. Gaudineer, Jr. and Paul Zoss. The respondent was present throughtout the hearing, together with his attorney, John L. Butler. The hearing was held in private pursuant to the wishes of the respondent and the testimony of witnesses was presented and evidence adduced and offered by both parties and record duly made.

That time for submission of written arguments and briefs was granted to the parties and said parties have complied therewith.

That on the 28th day of January, 1979, the matter was fully submitted to the First Division of the Grievance Commission of the Supreme Court of Iowa, and the Grievance Commission makes the following findings of fact, conclusions of law and recommendations.

FINDINGS OF FACT

The record conclusively shows the following facts to have been established by clear and convincing evidence.

That the respondent, John D. Randall, is an individual licensed to practice law in the courts of the State of Iowa and that he resides in Cedar Rapids in Linn County, Iowa.

That in 1942 or 1943, an attorney-client relationship was created between Lovell Myers and the respondent, John D. Randall, which continued until October of 1975.

That for a considerable number of years, the respondent, John D. Randall, and Lovell Myers were equal participants in a joint venture owning and operating agricultural lands; and matters such as tax returns, corporate organization, filing of financial statements and other legal and quasi-legal requirements were satisfied by the respondent, John D. Randall.

That for many years the respondent, John D. Randall and Gilbert Morningstar had an

attorney-client relationship as well as an employer-employee relationship. That on and prior to the 14th day of March, 1973, the joint venture of Randall-Myers and the corporate venture known as Myers Farms, Inc. owned approximately 2500 acres of Linn County and Iowa farm land and other assets.

That on or about the 17th day of February, 1973, Gilbert Morningstar confronted the respondent, John D. Randall and Lovell Myers in the office of the respondent and accused them of having conspired to commit forgery and fraud (page 231, direct examination of Morningstar; page 9A, cross examination of Morningstar; page 39, testimony of John D. Randall).

That prior to the 14th day of March, 1973, the respondent, John D. Randall, suspected a conspiracy between Morningstar and Myers to defraud the respondent.

That on the 14th day of March, 1973, or before, the respondent, John D. Randall, caused to be prepared an instrument titled

"The Last Will and Testament of Lovell Myers", in which instrument the respondent, John D. Randall, was named sole devisee and executor of the estate of the said Lovell Myers (page 53 and 94 of direct examination of John D. Randall).

That on the 14th day of March 1973, Lovell Myers executed said Last Will and Testament in the presence of Noreen K. Utecht, the then secretary of the respondent, and James C. Bennett, an associate in the practice of law of the respondent. At the time of the execution of said instrument, the decedent, Lovell Myers, "glanced" at said instrument, that it was not read nor was the respondent present at the time of execution (Utecht examination, page 304).

That upon the death of Lovell Myers, the respondent, John D. Randall, did offer the Last Will and Testament of Lovell Myers, executed on the 14th day of March, 1973, for probate in the District Court of the State of Iowa in and for Linn County, the same being

docketed Probate No. P3070-0276; that the respondent secured orders admitting the same to probate and secured letters of appointment of John D. Randall as executor of said estate.

That the decedent, Lovell Myers, was survived by a daughter, Marie Jensen, and two grandchildren, and that the said Marie Jensen filed objections to the probate of the Last Will and Testament of the decedent, Lovell Myers, dated March 14, 1978, which action was withdrawn and dismissed prior to hearing. That the terms and conditions of settlement of said stipulation are of record in this cause. That the settlement was the personal obligation of the respondent, John D. Randall, and not the obligation of the estate of Lovell Myers, deceased, nor the obligation of Myers Farms, Inc.

That an action brought by Gilbert Morningstar against Myers Farms, Inc., Lovell Myers and John D. Randall alleging forgery and fraud was settled after submission of this matter to this panel of the Grievance Commission.

That the respondent, John D. Randall, represented the interest of Lovell Myers in said action until October of 1975 and at the same time represented his own interests and the interests of the corporate entity, Myers Farms, Inc.

CONCLUSIONS OF LAW

The respondent is charged in two counts with violation of the following Disciplinary Rules and Ethical Considerations:

Disciplinary Rule 1-102(A)(1), (3), (4) and (6)

Disciplinary Rule 4-101(B)(2) and (3)

Disciplinary Rule 5-101(A)

Disciplinary Rule 5-104(A)

Ethical Considerations 1-5, 5-5, 5-6, 9-6, 5-1, 5-2, and 5-3.

The respondent is further charged with violation of Section 610.15 and 610.24, Subsections (3) and (4) of the Code of Iowa.

Resting wholly on the testimony and evidence adduced and offered by the complainant and the respondent, including all admitted exhibits, it is the finding and conclusion of

the First Division of the Grievance Commission of the Supreme Court of Iowa that the respondent violated the letter and the intent of each of the Disciplinary Rules, Ethical Considerations and Sections of the Code of Iowa with which he is charged, except Section 610.15, Code of Iowa.

The respondent complains in pleadings, motions, briefs, and argument of the "complaint" filed with the Iowa State Bar Association by Marie Jensen as having been filed for the purpose of "forcing a settlement" of the will contest action brought by Marie Jensen. It is to be pointed out that hearing before the Grievance Commission is not a will contest and the purpose for which the activities of the respondent, John D. Randall, are brought to the attention of the Iowa State Bar Association is of no concern to the Grievance Commission. The letter and complaint of Marie Jensen initiated the Ethics and Professional Conduct Committee and Commission of the Supreme Court to make an investigation. Having made

such investigation, they filed formal Complaint with the Grievance Commission of the Supreme Court of Iowa. That the filing of this formal Complaint by the Professional Ethics and Conduct Committee and Commission of the Supreme Court of Iowa was accomplished only after an independent and careful investigation by said Committee.

The respondent, in testimony, in motions, briefs and arguments, relies heavily on the defense of "exceptional circumstances" as relieving him of Disciplinary Rules and Ethical Consideration in the preparation, drafting and execution of a will in which he is named sole devisee and executor of the estate. The "exceptional circumstances" developed by all of the testimony and exhibits before the Grievance Commission are diame trically opposed and exactly opposite of those "exceptional circumstances" as would relieve the respondent of the Disciplinary Rules and Ethical Considerations and would rather heighten and accentuate and necessitate

of complying with the Disciplinary Rules and Ethical Considerations. The Commission notes with approval the case reported as Bar Association v. Ramey, 32 Ohio State 2nd, page 91 (1972).

Additionally, it is the finding of this Division of the Grievance Commission that the circumstances leading to the representation of Lovell Myers by the respondent, John D. Randall, in the action brought by Gilbert Morningstar and at the same time representing his personal interests and the interests of Myers Farms, Inc. was accomplished without disclosure, without excuse and was a clear representation of conflicting interests.

It is the finding of this Division of the Grievance Commission that the ruling of the President overruling the motion for summary judgment should be and it is affirmed; that the ruling of the President overruling the motion of the respondent to dismiss the Complaint at the close of complainant's evidence should be and the same is affirmed;

that the ruling of the President overruling the motion of the respondent to dismiss the complaint at the close of the evidence should be and it is herewith affirmed.

Respondent, in brief and argument, complains of a newspaper story appearing in the Cedar Rapids Gazette after the conclusion of the hearing in the above entitled matter and also complains of a news story aired by WMT Radio on the 15th day of December, 1978, and after completion of hearing in the above entitled matter. The President and members of the Commission made clear to all witnesses, parties and attending personnel that the hearing was confidential. The "source" referred to in the newspaper story is unknown to this Commission and was not a member of this Division of the Grievance Commission. The radio release refers to "a member of the Grievance Commission" and such member was not a member of this Division. That the release of said stories do not and have not prejudiced the respondent before this Division of the

Grievance Commission. The public records of the will contest and the Morningstar action had received considerable notoriety prior to the filing of the Complaint with the Grievance Commission. That the public record of actions brought by the respondent against others has been given notoriety. These issues are considered by this panel of the Grievance Commission only as they are the result of the activities and actions of the respondent who, by irresponsiblity and improper conduct, erodes and destroys public confidence in the law and lawyers.

It is the finding of this Division of the Grievance Commission that the violation of the Disciplinary Rules and Ethical Considerations cited and complained of by the respondent are such unprofessional and unethical conduct as to require discipline.

In arriving at this finding, this Division of the Grievance Commission is mindful of the determination of the Supreme Court of Iowa in the matter of Frerichs, 238

NW2d 764 (1976), that the Ethical Considerations set out in the Iowa Code of Professional Responsibility for Lawyers are not merely aspirational.

It is the further finding of this Division of the Grievance Commission that the respondent has held high office in the associations of his profession and particularly the presidency of the American Bar Association. This Division of the Grievance Commission concludes that the conduct of the respondent in failing to terminate attorney-client relationships with Lovell Myers in the drafting of his will or pursuing litigation under all of the circumstances is so reprehensible and so flagrantly violative of Disciplinary Rules and Ethical Considerations that it cannot be condoned or go unnoticed. That the judgment of the Supreme Court of Iowa should be such as to make it clear to the respondent, to the public, and other members of the profession that conduct of the type demonstrated in the testimony and evidence of this cause will not

be tolerated. It is, therefore, the

RECOMMENDATION

It is the Recommendation of the First Division of the Grievance Commission of the Supreme Court of Iowa that the respondent be disbarred from the practice of law and not be reinstated thereafter.

Dated this 26th day of February, 1979.

On March 16, 1979, the Respondent filed the following:

EXCEPTIONS TO FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION

Comes now the respondent in the above entitled matter and excepts to the Findings of Fact, Conclusions of Law and Recommendation made by the First Division of the Grievance Commission as filed in the office of the secretary of the Grievance Commission February 27, 1979, and shows:

1st. He excepts to the denial of his challenge to the Grievance Commission panel and its persisting to conduct this hearing,

and in support of this exception states:

1.1. At the hearing of this matter it was evident from the record that the panel was considering extraneous matters to the issues presented by the complaint.

1.2. That notwithstanding the statement of the president of this division declaring its policy, this division porceeded to consider all of such matters in its findings, conclusions and decision.

1.3. That its findings, conclusions and recommendation were partly based upon such extraneous matters.

1.4. That the division of this Commission hearing this matter violated the provisions of the rules by communicating the fact of this hearing to the media, to-wit:
The Cedar Rapids, Gazette newspaper and WMT Radio Station, both of which gave publicity to this matter prior to its determination.

All of the foregoing has deprived this respondent of his rights and privileges under the Constitution of the United States,

under the Constitution of the State of Iowa and under the rules of the Supreme Court of Iowa and by reason of all of which he has been denied a fair hearing.

2nd. That the finding that an attorney-client relationship in 1942 or 1943 was created between Lovell Myers and respondent, John D. Randall, continuing until October, 1975, is not supported by substantial evidence; and while on occasions there may have been evidence of attorney-client relationship, such relationship was not a continuing matter. Further, all such times, except beginning 1973 and thereafter to the present, were remote, irrelevant and immaterial.

3rd. He excepts to the finding by inference that the filing of tax returns and financial statements were legal work satisfied by the respondent, John D. Randall, which finding this respondent says is not supported by the law and does not per se involve any attorney-client relationship; and the finding of "other legal and quais-legal requirements

were satisfied by the respondent, John D. Randall," in indefinite, general, irrelevant and immaterial to any charge involved in this case and deprives him the respondent of a fair trial in that it denies him the right to specifically except from specific findings of fact. In addition, respondent shows that there are no Ethical Considerations or Disciplinary Rules condemning a quasi-legal relationship is without any basis or definition.

4th. The respondent excepts to the finding that an attorney-client relationship existed between John D. Randall and Gilbert Morningstar for the reason that the same is unsupported by the substantial weight of the evidence. The only possible support could be the preparation of Morningstar's income tax returns for which no fees were paid, and the preparation of income tax returns is a matter which is not exclusively related to the law practice.

5th. The respondent excepts to the following paragraph, to-wit:

"That on or about the 17th day of Feburary, 1973, Gilbert Morningstar confronted the respondent, John D. Randall and Lovell Myers in the office of the respondent and accused them of having conspired to commit forgery and fraud (page 231, direct examination of Morningstar; page 9A, cross examination of Morningstar; page 39, testimony of John D. Randall)."

for the reason that the Commission failed to recognize that the said Morningstar did not maintain any such accusation but concluded that Lovell Myers had individually done this act and he believed Lovell Myers. That the Commission left thus an unbalanced finding of fact, prejudiced finding of fact and denied a full and fair finding of fact in regard to this particular matter.

6th. The respondent excepts to the following:

"That prior to the 14th day of March, 1973, the respondent, John D. Randall, suspected a conspiracy between Morningstar and Myers to defraud the respondent."

for the reason that the same is an unbalanced finding of fact, failing to recognize the contrary testimony in regard thereto; also

for the reason that the same is irrelevant and immaterial to any issue in this case but, as with the last preceding paragraph, it must have been included in the findings of fact for the purpose of supporting, argumentatively, the decision of the Grievance Commission.

7th. This respondent excepts to the following paragraph appearing on page 3 of the opinion of the Grievance Commission:

> "That on the 14th day of March, 1973, or before, the respondent, John D. Randall, caused to be prepared an instrument titled 'The Last Will and Testament of Lovell Myers', in which instrument the respondent, John D. Randall, was named sole devisee and executor of the estate of the said Lovell Myers (page 53 and 94 of direct examination of John D. Randall)."

for the following reasons: The finding of fact is unbalanced, it fails to consider other facts which appear in regard to the execution of the Will and other background evidence of previous reciprocal wills between the respondent and Lovell Myers and that more than three years passed at the execution of the will complained of before the death of Lovell Myers. Further-

more, during this three year time the said Lovell Myers had other representation, to-wit: Richard Nazette. The Commission again must have found this particular fact out of context for the purpose of supporting its conclusions and recommendations and have thereby denied this respondent a fair trial.

8th. The respondent excepts to the finding of fact:

> "That on the 14th day of March, 1973, Lovell Myers executed said Last Will and Testament in the presence of Noreen K. Utecht, the then secretary of the respondent, and James C. Bennett, an associate in the practice of law of the respondent. At the time of the execution of said instrument, the decedent, Lovell Myers, 'glanced' at said instrument, that it was not read nor was the respondent present at the time of execution (Utecht examination, page 304)."

for each and all the reasons urged in connection with the exception to the last preceding paragraph.

9th. The respondent excepts to that paragraph appearing on page 4 of the Grievance Commission's findings, conclusions, and recommendation as follows:

"That the decedent, Lovell Myers, was survived by a daughter, Marie Jensen, and two grandchildren, and that the said Marie Jensen filed objections to the probate of the Last Will and Testament of the decedent, Lovell Myers, dated March 14, 1973, which action was withdrawn and dismissed prior to hearing. That the terms and conditions of settlement of said dispute are of record in this cause. That the settlement was the personal obligation of the respondent, John D. Randall, and not the obligation of the estate of Lovell Myers, deceased, nor the obligation of Myers Farms, Inc."

for the reason that the same fails to recognize the dismissal with prejudice filed in this matter and its effect in determining the proceedings favorably toward the respondent. It further appears that the Commission failed to recognize the antagonism that existed between Lovell Myers and his daughter. It failed to recognize that in the will of 1953 Lovell Myers had left his daughter only a small sum. However, the Commission in its finding, at least by inference to the recitation of the daughter and father relationship, indicated an unfavorable view based solely upon this relationship.

10th. That the respondent excepts to the finding of fact:

> "That an action was brought by Gilbert Morningstar against Myers Farms, Inc., Lovell Myers and John D. Randall alleging forgery and fraud was settled after the submission of this matter to this panel of the Grievance Commission. That the respondent, John D. Randall, represented the interests of Lovell Myers in said action until October of 1975 and at the same time represented his own interests and the interests of the corporation entity, Myers Farms, Inc."

for the reason that it fails to include the allied facts surrounding this representation, particularly:

10.1. The necessity that Lovell Myers be represented and his failure to secure representation.

10.2. The representation of Lovell Myers by Richard F. Nazette.

10.3. That no prejudice appeared from the representation, but on the other hand it appeared that Lovell Myers was benefited by the representation.

The respondent now excepts to the conclusio of law as follows:

11th. He excepts to the finding of violation of Disciplinary Rule 1-102(A)(1), (3), (4), and (6) for the reason that the same is indefinite, uncertain and not supported by any substantial evidence.

12th. The respondent excepts to the conclusion that the Disciplinary Rule 4-101 (B)(2) and (3) was violated for the following reasons:

12.1. The same is not supported by an substantial evidence.

12.2. The same is a general and non-specific conclusion of law.

13th. The respondent excepts to the finding that the respondent has violated Disciplinary Rule 5-101(A) for the reason that the same is not supported by any substantial evidence in that among other things the respondent is not shown to have accepted any employment and further that the evidence shows that in the professional judgment of the respondent it was for the best interest of the said Lovell Myers that he,

Randall, proceed to represent him.

14th. Respondent excepts to the conclusion that he violated Disciplinary Rule 5-104(A) for the reason that the same is not supported by substantial evidence, the conclusion is indefinite, it fails to point out wherein it is concluded that a violation occurred and it fails to appear that there were any differing interests in connection with this matter.

15th. It is to be noted that there is no conclusion of law that the respondent violated Disciplinary Rule 5-101(B) either in its present form or form in which it existed at the time of the alleged acts of the respondent.

16th. The respondent excepts to the blanket conclusion of violations of Ethical Consideration 1-5, 5-5, 5-6, 9-6, 5-1, 5-2, and 5-3 for the reason that:

16.1. The same is omnibus.

16.2. The same is indefinite and uncertain.

16.3. The same is not supported by any substantial evidence.

17th. The respondent excepts to the conclusions of law as to the violations of the Disciplinary Rules and the Ethical Considerations made by the Grievance Commission for the reason that the same are:

17.1. Not within the scope of the pleadings.

17.2. Extraneous to the principal issue involved as to whether or not there was any unethical conduct in the preparation of the will of Lovell Myers by John D. Randall.

18th. The respondent excepts to the conclusion of law that he violated Section 610.15 of the Code for the following reasons:

18.1. The same is not supported by any substantial evidence.

18.2. The same is contrary to the weight of the evidence.

18.3. The same is indefinite and deprives this respondent of a fair trial.

19th. The respondent excepts to the conclusions of law appearing on page 6 of its findings as follows, to-wit:

> "The respondent, in testimony, in motions, briefs and arguments, relies heavily on the defense of 'exceptional circumstances' as relieving him of Disciplinary Rules and Ethical Considerations in the preparation, drafting and exectuion of a will in which he is named sole devisee and executor of the estate. The 'exceptional circumstances' developed by all of the testimony and exhibits before the Grievance Commission are diametrically opposed and exactly opposite of those 'exceptional circumstances' as would relieve the respondent of the Disciplinary Rules and Ethical Considerations and would rather heighten and accentuate the necessity of complying with the Disciplinary Rules and Ethical Considerations. The Commission notes with approval the case reported as Bar Association v. Ramey, 32 Ohio State 2nd, page 91 (1972)."

for the reasons that:

19.1. The same is entirely out of context in the conclusions.

19.2. The Commission failed to find either for respondent or against the respondent on the matter of the violation of any Ethical Consideration or Disciplinary Rule involving the exceptional circumstances.

19.3. The same is replete with conclusions and not based upon any particular finding of fact.

19.4. The same is indefinite.

19.5. The same fails to recognize the evidence of exceptional circumstances which exist in this case.

19.6. The same fails to specify wherein the exceptional circumstances developed are so diametrically opposed to the exceptional circumstances as would relieve the respondent of the Disciplinary Rules.

20th. The respondent excepts to the conclusion of law:

> "Additionally, it is the finding of this Division of the Grievance Commission that the circumstances leading to the representation of Lovell Myers by the respondent, John D. Randall, in the action brought by Gilbert Morningstar and at the same time representing his personal interests and the interest of Myers Farms, Inc. was accomplished wihtout disclosure, without excuse and was a clear representation of conflicting interests."

for the reasons that:

20.1. There is not substantial evidence

to support the conclusion.

20.2. The same is indefinite.

20.3. The same is not supported by any finding of fact.

20.4. The same deprives this respondent of a fair hearing.

20.5. The same fails to recognize that the interests between Lovell Myers and John Randall in the defense of the lawsuit involved were not conflicting, nor were the personal interests in Myers Farms, Inc. conflicting.

20.6. The same refers to some disclosure without in any way delineating the reference made.

21st. The respondent excepts to the finding of the Commission as a conclusion of law relative to the overruling of his motion for summary judgment and motion to dismiss.

22nd. The respondent excepts to the portion of the conclusions appearing on page 7 relative to the publication in the Cedar Rapids Gazette and the publicity given on WMT

Radio for the reason that its conclusions are not supported by an substantial evidence but are merely reiterated for the purpose of supporting its final conclusions. Further, the conclusions are not supported by any finding of fact. Furthermore, it is recited in the Commission's findings of fact and conclusions of law that in justification of the public disclosure that:

> "The public records of the will contest and the Morningstar action had received considerable notoriety prior to the filing of the Complaint with the Grievance Commission. That the public record of actions brought by the respondent against others has been given notoriety. These issues are considered by this panel of the Grievance Commission and actions of the respondent who, by irresponsible and improper conduct, erodes and destroys public confidence in the law and lawyers."

There is nothing in the record relative to notoriety to support such conclusions. But in connection with the publicity given to the matters, respondent also excepts to the reading from the Findings of Fact, Conclusions of Law, and Recommendation by the secretary of the Commission over Radio Station WMT.

Attached hereto is the affidavit of the respondent, marked Exhibit "A" and made a part of these exceptions.

23rd. The respondent excepts to that portion of the conclusions of law reading as follows:

> "It is the finding of this Division of the Grievance Commission that the violation of the Disciplinary Rules and Ethical Considerations cited and complained of by the respondent are such unprofessional and unethical conduct as to require discipline."

for the reasons that:

23.1. The same is not supported by any substantial facts.

23.2. The same is not supported by any findings of fact.

23.3. The same is general and indefinite.

23.4. The same uses the Ethical Considerations as a basis for its recommendation and refused to recognize the limitation of the Ethical Consideration in its "aspirational" aspects.

24th. The respondent excepts to the conclusion appearing on page 8 as follows:

> "In arriving at this finding, this Division of the Grievance Commission is mindful of the determination of the Supreme Court of Iowa in the matter of Frerichs, 238 NW2d 764 (1976), that the Ethical Considerations set out in the Iowa Code of Professional Responsibility for Lawyers are not merely aspirational."

for the reason that the same is a misinterpretation of the Supreme Court's holding in the case cited and it is a distortion of the applicability of Ethical Considerations for determination of the question of disciplinary action.

25th. The respondent excepts to the last paragraph of the conclusions of the Disciplinary Commission for the reason that the same is not supported by any substantial evidence, the same is but a conclusion of law and an argumentative diatribe against this respondent, it is prejudicial and was prejudicial when wrongfully given to the media for publicity by the media. It cannot be executed by the conclusion in the findings and conclusions that this was a matter of common knowledge.

26th. The Commission has set forth in the introductory paragraph immediately

following "Findings of Fact," page 3, that the record conclusively shows the things that they allegedly found, but no reference is made concerning the evidence that:

26.1. Lovell Myers had another attorney after the will had been made but no steps had been taken to revoke the will.

26.2. Three years passed between the time of the making of the will complained of and the death of Lovell Myers.

26.3. The wills executed by Lovell Myers and John Randall prior to the one complained of were reciprocal and provided little if nothing for the daughter.

26.4. Relations between Lovell Myers and his daughter were not good.

26.5. Morningstar believed Lovell Myers that he, Lovell Myers, was responsible for the alleged forgery to the exclusion of the respondent.

26.6. The effect of the court order admitting the will probate.

26.7. The daughter, Marie Jensen, was

not highly regarded by her father but that there was animosity between them.

26.8. The Jensens had been forced to move from the farm by the father.

26.9. The only element of complaint at the outset was the will of Lovell Myers.

26.10. No formal hearing was held by the Ethics Committee, but the complaint was executed on September 6, 1977, but not filed until May of 1978.

26.11. There is no evidence of any full investigation by the Ethics Committee.

27th. The very thing that was complained of and the basis for the complaint of the Ethics Committee against this respondent, i. e. the will of Lovell Myers, was not a basis for the ruling of the Grievance Commission.

28th. The respondent excepts to the recommendation of the Grie vance Commission and shows that the same is not supported by any proper findings of fact or conclusions of law. Further, such recommendation displays the animus of the Commission in that they

recommended that the respondent "not be reinstated thereafter," which recommendation is beyond the pale of their authority and wholly unwarranted.

AFFIDAVIT

I, John D. Randall, being first duly sworn on oath, depose and say that I am the Respondent in the proceeding entitled "The Committee on Professional Ethics and Conduct of the Iowa State Bar Association, Complainant vs. John D. Randall, Respondent." That on February 28, 1978, the date of the filing of the "Findings of Fact, Conclusions of Law, and Recommendation" of the "Grievance Commission of the Supreme Court of Iowa, First Division" I was listening to our local radio station, WMT, either the news report which is broadcast shortly after 5:00 p.m. or the news report which was broadcast from WMT between 6:00 p.m. and 7:00 p.m. That such news report commented upon the "Findings

of Fact, Conclusions of Law, and Recommendations" of the First Division of the Grievance Committee and during the comment and the broadcast, Edward H. Jones, Secretary of the Iowa State Bar Association, read from the "Findings of Fact, Conclusions of Law, and Recommendations."

Further affiant sayeth not.

H

ORIGINIAL OPINION OF SUPREME COURT OF IOWA. THE PORTION WHICH WAS CHARGED BEFORE BEING PUBLISHED IN 285 N.W.2d 161. THAT PORTION IS UNDERLINED

John D. Randall, the respondent attorney, was charged in a two-count complaint with unprofessional conduct. One count arose from Randall's status as both draftsman and sole beneficiary of a client's will. The other count primarily concerned Randall's representation of the same client in litigation in which there was a conflict between the client's

and Randall's interests. Finding violation on both counts, our commission recommended disbarment. On our de novo review we adopt the recommendation.

Randall met Lovell Myers sometime in the early 1940s. In 1943 he represented Myers in his divorce. In 1946 Randall and Myers entered a joint venture for the purchase of farmland in Linn County. The respondent arranged financing for Myers' farming operations. In 1952 the operations were incorporated as Myers Farms, Inc. and Myers and the respondent each received 50 percent of the stock. The corporation did not succeed to all their business activities, however, so the joint venture continued to exist. Myers continued to manage the farms while Randall attended to the financial affairs of the corporation. The attorney-client relationship continued as well. An associate of Randall represented Myers in an audit by the Internal Revenue Service and the Randall office regularly regularly prepared Myers' and the corporation's

income tax returns, attended to real estate instruments, and examined abstracts of title.

Prompted by an audit, the joint venture in 1967 transferred its land to the corporation. The corporation prospered. By the time of Myers' death in 1976 the corporate net worth amounted to about four and one-quarter million dollars.

Marie Jensen, Myers' only child, was born in 1930, After her parents' divorce she lived with her mother but saw Myers frequently. In 1949 she married Warren Jensen. Their two sons were born in 1950 and 1953. The elder was named for Myers. In 1950 Marie and Warren moved on one of the corporation farms but left shortly due to the farmhouse's lack of heat and a disagreement over livestock methods. Nonetheless Myers helped Marie and Warren move to another farm. In 1974 Marie, Warren, and one of their sons moved to Cedar Rapids to assume management of the corporate farms.

Except for these events the relationship between Myers and his daughter is disputed. On the one hand the complainant notes a number of things. There was cooperation between Warren and Myers. Myers acted amicably toward Warren and doted on his grandsons. Myers suffered from diabetes, heart trouble, and cancer and was hospitalized in 1975, after which both Marie and one of her daughters-in-law attended him during convalescence. In 1970 Myers told Marie, without mentioning a will, that when he disposed of his property, she and Sue Jameson (Randall's daughter) would each have a farm plus half interest in Myers Farms, Inc.

On the other hand Randall asserts Myers was hostile toward his daughter. Some evidence offered by Randall must be disregarded as not probative. Yet, James W. Grummer, Myers business acquaintance, testified Myers told him in August 1973 that he and Randall had reciprocal wills. (There is nothing in the

record to indicate Randall ever executed a will bequeathing anything to Myers.) Randall stated that in 1953 he prepared another will for Myers, also bequeathing the property to himself. It is not shown whether the 1953 will was ever executed.

Richard Nazette, a Cedar Rapids attorney who represented Myers in the Morningstar lawsuit (to be discussed later), testified that Myers was estranged from his daughter during the time she lived with Myers' former wife. This was from 1946 to 1956. Nazette also testified he overheard a 1975 conversation between Myers and Randall about "strained relations" between Myers and Marie.

Randall's secretary also testified Myers ramarked, after the 1953 will was prepared, "she" (presumably his daughter) never cared about him. Randall asserted he dissuaded Myers from disinheriting Marie completely in the 1953 will. He also testified Myers and Marie continued in conflict from the time the

joint venture was formed until Myers' death. This was the reason, according to Randall, Myers intended to leave all his property to him.

Gilbert Morningstar first worked for Myers in 1938 and resumed as farm worker and foreman from 1946 until the end of 1974. During these years Morningstar and Myers worked together daily and maintained a close personal friendship. Morningstar once loaned $50,000 to Myers Farms, Inc.

In 1956 Morningstar bought land known as the Hess eighty. (Randall testified that Morningstar acted only as "straw man" in this transaction for the Randall-Myers joint venture. But we find no support for such a cliam.) Morningstar later bought land known as the Zach-120 acre tract. Morningstar's lands were farmed by Myers Farms, Inc. on a crop-share basis.

During February of 1973 Evelyn Morningstar, Gilbert's wife, visited the Linn County court-

house to learn the legal descriptions of properties she and her husband owned. This was preparatory to making out her will. She discovered a record of a warranty deed to the Hess eighty from her husband to Myers Farms, Inc. She also found that the same 80-acre tract was subsequently mortgaged for $90,000. Of course she immediately reported this to her husband.

Morningstar called Randall at his office and told him that Myers wanted to see him there at eight o'clock the following morning. Early the next morning Morningstar told Myers that Randall wanted to see him (Myers) in his office.

Morningstar then confronted the two at Randall's office. He angrily charged that his and his wife's signatures had been forged on the deed. After threatening that someone was going to jail he left. Myers followed him to the hallway outside and admitted to Morningstar that he had forged both signatures. He begged Morningstar to return to the office so that the matter could be discussed. Morningstar

refused to do so.

Myers then returned to Randall's office and told him what he had done. Myers was upset and weeping. As a result Randall and Myers, on behalf of the corporation, quit claimed the Hess eighty to the Morningstars. Randall testified that Myers assured him that he would lose nothing by joining in the deed. Randall gave as two reasons for signing: his desire to save Myers from Morningstar's threat of jail and to protect his own associate who had notarized the forged deed in the absence of its signers.

About the time of this incident Marie received a visit from her father. He was very upset and said that Morningstar was no longer to help him farm and that he wanted Marie and Warren to come to Cedar Rapids to help. He did not tell them why. Later Marie, Warren, and their two sons met with Randall and Myers. Randall did all the talking. He told them that Morningstar was no longer to work on the farms and that Warren and his two

sons should come to Cedar Rapids to take over. But a short time after this meeting, Myers wrote that things were to continue as they were and that she and Warren need not come.

Instead, upon Myers' assurance that the mortgage would be satisfied, Morningstar agreed to remain at work for the corporation. The mortgage nevertheless remained a lien for several months. In 1974 Morningstar resigned and brought suit. See Morningstar v. Myers, 255 N.W.2d 159 (Iowa 1977).

On March 14, 1973, Myers came to Randall's office and executed a will which Randall had drafted earlier the same day. By the will Myers left all his property to Randall. Randall was named executor. Randall admits that he at no time advised Myers to seek independentcounsel in the matter. After it was executed the will was left with Randall. Contrary to the usual procedure in the office no copy of the will was placed in office file; instead the original was placed in Randall's private drawer. Incredibly, Randall testified

he then forgot about it.

Shortly after Myers died in February 1976 Marie and Warren visted Randall on corporation business. Randall asked if they knew of any will by Myers and they answered that they did not. Randall denied possession of any such will. Marie learned of her father's will when Morningstar obtained a copy from the clerk of court and delivered it to her.

We do not believe Randall's testimony that he forgot about the matter. We find he was not truthful with Marie when he denied possession of the will.

Marie brought suit to set aside Myers' will. By way of reply Randall filed an action for malicious prosecution and abuse of process. He also filed a claim in the estate for himself and for the corporation concerning the Hess eighty. After protracted maneuverings the matter was settled. Randall paid Marie $35,000 (In the published Opinion the figure was $700,000) and conveyed clear title to a corporate farm. Randall also assumed

liability as sole devisee for all taxes and costs of administration. The value of this settlement was about one and one-half million dollars.

When Morningstar brought suit Randall entered an appearance and filed motions for Myers. He also initiated an interlocutory appeal to this court. At first Myers refused to be represented by any attorney. Finally at Randall's suggestion Myer retained Richard Nazette who appreaed as his attorney in the appeal to us. Randall did, nevertheless, remain attorney for the corporation.

Randall admits that at the time of Morningstar's suit he had some anxieties about whether Myers was treating him fairly. But he stated in these proceedings that these feelings never amounted to a suspicion until 1975 when he read Myers' deposition. He concedes from the time he read the deposition a conflict of interest did arise.

When questioned in a deposition taken in the Morningstar suit about delivering the

quit claim deed to the Morningstars Randall testified:

> Q. Did they appear to be upset, the Morningstars?
>
> A. Well I don't know. I was pretty upset myself, and I don't know what I particularly paid any attention, because by that time I thought that the whole deal had been connived, very frankly. I don't know.
>
> Q. In what respect?
>
> A. Well, between Myers and Morningstar. The whole picture was one to me absolutely shocking. I mean -- and the fact that there was no opportunity given to discuss and find out what the I mean, to come in with the very strange way in which it was set up and then to come in with threats. The whole thing looked to me like it was -- and I didn't know whether it was between Myers and Morningstar because I didn't know just exactly -- how close or just what they were trying to do.
>
> . . . .
>
> A. Probably was entirely wrong, but I mean, by that time that was sort of seeping through to me. And I didn't pay any attention to whether they were upset or not. I was.
>
> . . . .
>
> A. I had a strange sensation when this thing --this plan or scheme or arrangement on February 17, 1973. I probably had unworthy thoughts, and I still have a strange feeling about the whole picture as far as I'm concerned.
>
> . . . .
>
> Q. But did you, on February 17, 1973, harbor the feeling that Lovell Myers was cheating you in some way?
>
> A. Well, very frankly, after Lovell had went and insisted that I join the

quit claim deed to keep him out of jail, I thought it was a very strange situation. In fact, I at one time or another told him that I felt it was a very strange situation, because I thought the he was smart enough so that he wouldn't admit a forgery. In other words, it looked too pat to me. It looked as though it was a deal that had been cooked up between the two of them. That was what I concluded afterwards, at the time I was so shocked I didn't have any thinking about it. But then afterwards I thought, of all the pat things to take somebody, this was one of the best.

. . . .

A. I thought it was all a setup deal, I mean, including the time when Morningstar had thrown across the table out at his house a round trip ticket to Hawaii that we had paid for and that I had known nothing about. I said to Lovell, I said, "How many other things that I don't know nothing about?"

Randall's deposition clearly shows he very quickly concluded Myers and Morninstar had deceived him. The preparation of the will came in the midst of these realizations.

During the grievance commission hearing Randall attempted, without sucess, to explain by saying that he remained confused and uncomprehending; Myers' explanation had left him unsure that a conspiracy existed. Even less to his credit Randall took no action when he learned of Myers' forgery. He also

came to suspect that Myer had made improper payments from the corporation. Again he took no action because he wanted to secure settlement.

At the hearing before the commission Randall asserted he had not so quickly suspected a conspiracy. Only by 1978, he said, did he realize Myers had left him his estate to repay for the misappropriation of funds.

We flatly reject Randall's attempted explanations and conclude that he represented the corporation in large part to protect his own interests from those of Myers.

I. On oral submission before us Randall suggests that the procedings before the commission violated his right to due process under the Fourteenth Amendment of the United States Constitution. He did not present this issue before the commission or include it in the brief he submitted to us. In Committee on Prof. Ethics, etc. v. Behnke, 276 N.W.2d 838, 840-41 (Iowa 1979), cert. denied, U.S., S.Ct.,

L.Ed.2d (48 Lew Week 3189) (1979), we discussed what matter can be raised for the first time in submission of a disciplinary proceeding for our review. We think Randall's due process argument should have been submitted to the commission and certainly should have been included as a point in his brief in this submission. Because he failed to do either we consider the due process argument waived.

II. It is complaintant's burden of proof to establish the charge by a convincing the preponderance of the evidence. This burden amounts to less than is required in a civil suit. Committee on Prof. Ethics, etc. v. Bitter, 279 N.W.2d 521, 522 (Iowa 1979). We find the complaintant has easily established both counts in accordance with this standard.

At the time Randall drew the Myers will naming himself as beneficiary EC 5-5 provided in part: "Other than in exceptional circumstances, a lawyer should insist that an instrument in which his client desires to name him beneficially be prepared by another lawyer selected by the

client." We considered this language in Behnke, and held: "A violation of EC 5-5 -- par and parcel of our ethical code -- would be unethical conduct." 276 N.W.2d at 844.

Randall argues that the "exceptional circumstances" language which when existed in EC 5-5, at least in part, is justification for his conduct. We find the argument is patently without merit. Under the unique relationship Myers relied especially heavily on Randall and imposed great faith and trust upon him. An attorney owes no less professional honesty to his business associates and personal friends than to a causal client. There was nothing in the facts in this case amounting to "exceptional circumstances" which would allow Randall to draft the will in his own favor. We have passed from the era in which it can be argued it is professionally acceptable for a lawyer to draw a client's will in his own favor unless undue influence can be shown. We made this clear in Behnke, 276 N.W.2d at 844.

III. We have said Randall's representation of both his own and Myers corporate interests in the Morningstar suit was a conflict of interest. As such it was a violation of Drs 5-101(A) and 5-104(A) interpreting EC 5-1, 5-1, and 5-3. We discussed professional conflicts of interest in some detail in Committee onf Prof. Ethics, etc. v. Baker, 269 N.W.2d 463, 465-66 (Iowa 1978). The conflict, even according to Randall's own testimony, was flagrant and inexcusable. In view of his suspicions about Myers and Morningstar, and his belief the two were involved in a conspiracy against him, it was outrageous misconduct for him to continue in any way to represent Myers' interests.

IV. We must then determine the appropriate action for Randall's misconduct. In doing so we note that we are stung by Randall's testimony in at least two respects. It was sham to testify that, after drawing a will bequeathing himself upwards of two million dollars and then placing the will in his own

desk drawer, he forgot about it. And Randall's testimony on the crucial question of when he first began to suspect Morningstar and Myers were conspiring against him was contradictory; it shifted to meet complainant's showing of his conflict of interest. Although Randall had a clear right to defend against the charges he did not have a right to do so in a manner that was less than forthright.

There may be some question of whether Randall's convenient memory was more confused than it was corrupt. But the answer to this question does not relate to his fitness to practice law. In either event our conclusion is that his misconduct demands that he be disbarred.

LICENSE REVOKED.

All Justices concur, except McCormick, J., who takes no part.

I

EXHIBIT W: LETTER FROM JON M. McCRIGHT TO MR. JEROME DRUKER, INTERNAL REVENUE SETTING

OUT THE VALUE OF THE LOVELL MYERS ESTATE AS OF THE DATE OF HIS DEATH. (TRANSCRIPT P. 571)

October 31, 1978

Mr. Jerome Druker
Internal Revenue Service
Brenton Financial Center
Cedar Rapids, IA 52401

IN RE: Lovell Myers Estate Tax Audit
Date of Death: 2-18-76
S.S. No: 481-50-3361
Employers I.D. No: 42-6265309

Dear Mr. Druker:

Pursuant to our conference of 7-7-78, we are submitting, on behalf of the Lovell Myers Estate, the following figures which we believe to be the fair market value of the assets owned by Mr. Myers as of the date of his death on February 18, 1976.

As per our return, we have valued the items listed in Schedule A at $223,500. We believe that the land listed therein, specifically, Mr. Myers half-interest in the farm located in Linn County and the farm located in Cedar County are subject to a discount, and therefore, the fair market value of the land is as listed in the return. The basis for this discount is a series of cases beginning with the Estate of Whitehead, which can be found at Tax Court Memo, 1974-53. Also see In re Duncans Estate, 64 Tax Court Reports at 889.

After further evaluation of the stock ownership of Lovell Myers and Myers Farms, Inc. and land value appraisals being considered

along with numerous other factors, we feel that the fair market value of the decedent's 50 percent ownership in Myers Farms, Inc. is as follows:

ASSETS--MYERS FARMS, INC.

Autos and trucks	18,945.00
Cash on Hand	18,846.00
House at 809 5th Ave. SE	17,000.00
Equipment	185,975.00
Land	3,587,629.00
Total Value of Assets	3,828,395.00
Total Value of Assets	3,828,395.00
Less Total Liabilities	1,290,561.00
Net Value	2,537,834.00
Taxpayers Equity in Assets	1,268,917.00
Less 30% Discount (discount explainted below)	380,675.00
Net Equity in Coporation for Lovell Myers 50%	888,242.00

We feel that the estate is entitled to this discount based upon the existing case law, the facts of this case, and a number of considerations which are guidelines in valuing stock held in a closely held business. In Obermer v. United States, 238 Fed. Supp. 29, at Page 34, a case involving an estate owning stock in a closely held corporation, the Court stated that the parties agree that the definition of fair market value is the price at which the shares owned by the estate would have changed hands on the date of death of the owner between a willing buyer and a willing seller, neither being under any compulstion to buy or sell, and both having

reasonable knowledge of relevant facts. In Central Trust Co. v. United States, 305 Fed. 2d 393, the buyers and sellers are those people who are informed and who have adequate knowledge of material facts affecting the value of the property.

It is felt that a buyer knowing the facts and circumstances concerning the real property involved, the fact that only a 50 percent non-controlling interest is for sale, the litigation that is outstanding against the estate and the corporation, would all have a material affect on the value of the stock to any buyer. In addition, any buyer, be it mythical or real, would have to know that there would be special selling expenses involved, that a dissolution of the corporation would be a real possibility considering that there is only the buyer and other 50 percent owner, John D. Randall, could not agree as to how the corporation was to be run, a court ordered dissolution would have to be effected with an accompany partition action with all the necessary selling expenses involved therewith. Also involved is the capital gains on the sale of the stock itself, a very important consideration in the present case with lands being acquired since 1953 and through 1965 would be very high. There is also the possibility of a lack of marketability of the stock due to the vast holdings which therfore limit buyers and any buyer would have to have full knowledge of the corporation and its holdings and any legal action currently pending against it. Also, we believe the underlying assets are not the only consideration in valuing these shares of stock in that you must consider the earnings of the corporation since 1953 and many years prior to that time as a partnership in the raising of agricultural products for sale. The corporation itself has never engaged extensively in the sale of its real estate holdings, or was never an investment company, purchasing

land solely for the appreciation value.

The case of Ethel C. Dooly, Section 72, 164 P-H Memo TC, indicates that the value of closely held stock cannot be valued solely by the underlying assets, that there must also be taken into consideration the earnings and dividend paying power of the corporation. In this case, we feel that the capitalization of earnings, which show the corporation has had tremendous losses in the five years previous to the taxpayer's death, and therefore the stock would be entitled to a discount for that factor.

Schedule D, which is insurance on decedent's life of $26,026; jointly owned property, which included various bank accounts in Cedar Rapids -- $3,364; miscellaneous property of $775. The total gross estate is $1,141,889. After deducting the funeral expenses on Schedule J. the debts of the decedent, mortgages and liens total $979,717.00 and the exemption of $60,000, you end up with a taxable estate of $102,172.

The total tax due on this amount is $21,351.60, less $594,75 for a credit on state death taxes. The total tax due and owing on this estate is, therefore, $20,756.85.

I realize that probably we should amend the return, and will do so if you believe it is necessary. The values which we placed on these assets we believe to be reasonable, and we will supply you with this information if you so require it.

It is our belief that probably an amended return will have to be filed in this estate, and we will do so if you believe it is necessary. I would appreciate your contacting me concerning this possibility, and we will have the amended return filed immediately.

I hope you will respond shortly concerning the above matters.

Sincerely,

J

PORTION OF THE REPORT OF TEMPORARY ADMINISTRATOR APPOINTED BY THE LINN COUNTY DISTRCT COURT (HEREIN CALLED PROBATE COURT) TO PASS UPON THE CLAIM OF MYERS FARMS, INC. THIS RELATES TO THE MANIPULATION OF FUNDS OF CORPORATION BY THE DECEASED. THIS REPORT WAS APPROVED BY THE PROBATE COURT JULY 19, 1979, AND IS PART OF THE FILES IN THE MYERS ESTATE BEING EXHIBITS 1 thru 12(TRANSCRIPT P. 21 & 24)

In order that the Court may be aware of the operation of the corporation, the claimant herein, the corporation was engaged in a farming operation and the deceased, as President of the corporation, had the ownership of an undivided one-half of the stock, was President and operating manager of the corporation. That John D. Randall, Sr. did

not have any part in the operation of the corporation, and that while his office was used in order to handle the bookkeeping items having to do with tax problems, John D. Randall, Sr. had no knowledge of the operations of the corporation.

That the deceased wrote all of the checks having to do with the operation of the corporation, the only checks not written by the deceased were checks for the payment of taxes and checks for the payment in indebtedness of the corporation.

The financing for the corporation was all the responsi-bility of John D. Randall, Sr., and while the deceased and John D. Randall, Sr. were required to personally sign all evidences of indebtedness, your temporary administrator believes that without the signature of John D. Randall, Sr. there could have been no financing for the corporation.

That the monthly bank statements were forwarded to the deceased and that the office

of John D. Randall, Sr. did not see the bank statements or the cancelled checks until either the deceased brought them in or had them sent in to the office. That in connection with the handling of tax audits and tax matters, that was entirely the responsibility of John D. Randall, Sr. and his knowledge only extended to the information furnished him by the deceased and from the cancelled checks which had been submitted to his office.

In considering the claim of the corporation, your temporary administrator is aware of the rule with respect to the fiduciary relationship existing between officers of the corporation and its stockholders. In the recent case of Holden v. Construction Machinery Co., et al. (Iowa 1972), 202 NW2d 348 at 358, the Iowa Court stated the rule to be:

> "***Officers and directors of a corporate entity, particularly managment controlling directors of closely held corporations, occupy a fiduciary, or at least a quasi-fiduciary position as to the corporation or its stockholders. They are thus required to at all times act in utmost good faith and must ex-

> ercise powers held for the sole benefit of the corporation and its stockholders, never for their personal gain. Equity holds them stricly accountable as trustees.***"

In passing on the claim of the corporation, your temporary administrator recognizes the foregoing rule, and further recognizes that the deceased was the President of the corporation and, in effect, was the manager and in complete control of the corporation.

The corporation has alleged that the deceased advanced corporate funds to one Gilbert E. Morningstar for the purpose of enabling Morningstar to buy certain farms and that thereafter, such farms were operated by the corporation and that the corporation was at no time reimbursed because thereof. The record reflects that one Gilbert E. Morningstar, a close friend of the deceased, commenced to work for the corporation in 1952, having previously been employed by the joint venture of the deceased and John D. Randall, Sr. The said Morningstar and the deceased, had a falling out and as a result Morningstar sued the deceased,

the corporation, and John D. Randall, Sr. because of a certain claim arising out of a forgery by the deceased of a deed. This is mentioned at this time only because the information that your temporary administrator has been able to secure has been through answers by Morningstar to interrogatories which were propounded by John D. Randall, Sr. in such litigation.

The answers by Morningstar to the interrogatories reflected the fact that he had saved no money and had no property except an equity in a house which he owned in Cedar Rapids, Iowa and which had been purchased in 1944 for $5,750. This house was sold in 1951, and the revenue stamps on the deed indicated that the sale price was $10,500. Upon the assumption that Morningstar had made the payments as shown on the contract promptly, he would still have netted only approximately $7,000 out of the sale. That in the discovery procedure in the Morningstar case, demand was

made for all the bank accounts of Morningstar and there are no bank accounts which would indicate that he had received any such sum out of the sale of his house in 1951.

In 1953, Morningstar purchased 80 acres of land from one Anna O. Zach for $30,000, and as of the date of the purchase, December 23, 1953, Morningstar paid $5,000 and he was required to pay $4,000 on the first day of March, 1954. This contract is document no. 13211 in Volume 909, Page 23 of the deed record of Linn County, Iowa. That claimant contends with some force that Morningstar had no sums in this amount to make such payment. That further, and in 1960, Frank J. Zach and Libbie A. Zach assigned a contract to 120 acres of land to Morningstar and that the claimant contends that the deceased and Morningstar manipulated the funds of the corporation in order to make this purchase.

That the facts would create a suspicision which, if the deceased had been sued, would have necessarily had to have been explained,

but without further explanation, your temporary administrator doubts whether there would be a sustainable claim for $150,000.

However, your temporary administrator is convinced that from and after March 1, 1954, to March 1, 1955, the 80 acres of land which had been purchased from Anna O. Zach was operated by the corporation and that the corporation furnished the seed and fertilizer, equipment and manpower not only to plant the crops, but also to prepare the soil. That therefore as to the Anna O. Zach property, the corporation would have a claim against the decased for the farming of the said 80 acres because of the furnishing of seed, fertilizer, equipment and men to prepare the 80 acres for cropping and for taking off the crops, and that for such services, the claimant would be entitled to $4,800.

That the corporation further farmed the eighty (80) acres of land purchased from Anna O. Zach in 1953 from March 1, 1955 to March 1,

1966, and for the farming of the eighty (80) acres, together with the furnishing of seed, fertilizer, equipment and men to prepare the eighty (80) acres for cropping and for taking off the crops, the claimant would be entitled to $4,800.

That the Morningstars disposed of forty (40) acres of the Zach property to the school district in 1956, but the claimant farmed the forty (40) acres from 1956 to and including the date when the Morningstars disposed of fifteen acres of the forty (40) acres in 1959. That for the farming of the 40 acres from March 1, 1956, to and including the crop year of 1959, together with the furnishing of seed, fertilizer, equipment and men to prepare the forty (40) acres for cropping and for taking of crops, the claimant would be entitled to $9,600.

In 1960, Morningstar purchased a contract to 120 acres of land which had been purchased by Frank J. Zach and Libbie A. Zach from Anna

O. Zach and commencing with the crop year of 1961, the Claimant farmed the 120 acres of land for Morningstar, furnishing all of the seed, fertilizer, herbicide, equipment and men to prepare the 120 acres for cropping and for taking off the crop, and that this was done to and including the crop year of 1972. That for these services during that period of time, the claimant would be entitled to $98,400 for the furnishing of seed, fertilizer, herbicide, equipment and men to prepare the 120 acres for cropping and for taking off the crop, the claimant would be entitled to $98,400.

That with respect to certain property known as the Hess property, the deceased forged the names of Gilbert E. and Evelyn Morningstar to a deed for this 80 acre farm. That this was without the knowledge of the claimant, and that the claimant, believing that the property was the property of the corporation, paid off a balance of a first mortgage on the said Hess property to the

Metropolitan Life Insurance Company, as of the date of the refinancing was $6,700. That the claimant is allowed its claim in the amount of $6,700 on account of this payment, the joint venture having paid $2,300 principle payment on the Metropolitan loan and the said amount having been allowed as a claim against the deceased by John D. Randall, Sr.

That at the time of the forging of the deed and the transfer to the claimant, the Hess property was subject to a balance on a first mortgage to the Metropolitan Life Insurance Company and a balance of a second mortgage to Joseph Kilberger and Anna Kilberger in the total amount of $16,800.48. That further, since 1967, the claimant has paid interest on the $16,800.48 in the approximate amount to date of $11,410.98. That the claimant is therefore awarded because of the principal and interest on the Hess property, which has been paid by the claimant, the sum of $28,211.46, to date.

That in addition, the claimant paid taxes on the said property because of the fraud on the part of the deceased in the amount of $3,191.36, and such sum is allowed as a claim against the estate.

That further, the claimant has paid fire insurance premiums on the property from and after 1967, and that while the claim was made for the allowance of the sum of $10,000, your temporary administrator is of the opinion that the claimant is entitled to the sum of $6,500 on account of such insurance premiums and the said claim, because of the payment of fire insurance premiums and incidental items, is allowed in the sum of $6,500.

That as to paragraph 8 of the claimant's claim, your temporary administrator is of the opinion that there is no basis upon which the claimant should be awarded $40,000. That paragraph 8 of such claim is therefore denied.

However, during the years from 1967, to

and including the year of 1972, the claimant farmed the Hess 80, furnished the seed, fertilizer, herbicide, men, equipment and the labor to farm such property and for the furnishing of the seed, herbicide, the fertilizer, equipment, labor in preparing the ground for seeding, for harvesting the crops, for hauling the crops to market, for the period of the crop year from 1968 to 1972, inclusive, the claimant is allowed and is awarded as a claim the sum of $24,000.

That in addition, it appears from the affidavit of the employees of the claimant that during the year of 1966, immediately after the claim harvest, the deceased took the entire crew of the claimant, tore down two old barns, grubbed out trees, and straightened the field at the Hess property, thereby adding approximately 1-2½ acres of tillable field at the Hess property, and that further, they spent approximately a month's time doing this work. That further,

during that time, the north 40 acres were tiled, the said employees attending to such details as were necessary in connection therewith, and during this entire period of time, the machinery and equipment of the claimant were used for this purpose. That for the five employees plus the deceased and the equipment, the claimant is entitled to the allowance of the claim in the amount of $4,000, and the claimant is awarded the sum of $4,000 because of this service.

That without the knowledge of John D. Randall, Sr. and this claimant, the deceased financed a trip to Hawaii for Gilbert E. Morningstar and his wife as well as a trip to Spain. That these trips included the time spent by the Morningstars on the trip for which the Morningstars were paid. That as to these trips, the claimant is requesting the allowance of $4,000. That your temporary administrator believes that this is a greater allowance than would be warranted, but believes the claimant

should be awarded the sum of $3,000 and the claimant is awarded such sum.

K

PORTION OF ARTICLE ON "RULES OF LEGAL ETHICS: THE DRAFTING TASK", BY GEOFFERY C. HAZARD, JR., REPORTER FOR AMERICAN BAR ASSOCIATION SPECIAL COMMISSION ON EVALUATION OF PROFESSIONAL STANDARDS. MARCH, 1981, "THE RECORD OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK VOL. 36, NUMBER 3, P. 77, INTRODUCTION P. 77, THE TRIPARTITE DIVISION P. 85, DISCUSSION OF CANON 5.

In the early part of 1980, the American Bar Association Commission on Evaluation of Professional Standards published it Discussion Draft of a revision of the rules of ethics governing the American legal profession. The Commission is widely known as the Kutak Commission, after the name of its charirman, Robert J. Kutak, Esq., of Omaha, Nebraska. The Commission was created with the announced purpose of considering whether a revision of

the rules of ethics was necessary. In fact, before the Commission's creation it was well recognized that a comprehensive revision was needed. Hence, the principal task of the Commission was to undertake the rewriting.

Serious defects in the present Code derive from its three-level set of norms--the "axiomatic" Canons, the Ethical Consideration, and the Disciplinary Rules. But the apparent virtue of this format should be acknowledged, for many lawyers find comfort in it: The Canons and Ethical Considerations contain the lofty pronouncements of the 1908 Canons, while not going so far as to convert these sentiments into real legal obligations.

There is a similar split vision in the Code regarding certain aspects of conflicts of interest. Canon 5 says that "A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client." Ethical Consideration EC 5-1 says that "The professional judement should be exercised...solely

for the benefit of his client and free from compromising influences and loyalties." These propositions are merely aspirational, however, Disciplinary Rule DR 5-104(A), governing the inherently conflicted matter of business deals between client and lawyer, is much more narrowly drawn. It says that "A lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise his professional judgment therein for the protection of the client, unless the client has consented after full disclosure". This Rule is full of loopholes. To begin with, the Rule does not acknowledge that if the transaction between "client" and "lawyer", it is between them in their roles as such, and not as autonomous strangers. A transaction between a client and lawyer as such involves necessarily, and not merely contingently, some element of "professional judgment for the protection of the client." The Rule thus

implicitly allows business deals between client and lawyer even where the client relies on the lawyer's professional judgment in the transaction. Having done this, the Rule requires as protection for the client only that there be "disclosure" and "consent"; it does not require that the deal meet the standard of objective fairness which the law generally requires in transactions between persons in a confendential relationship. In schizophrenic fashion Canon 5, EC 5-1, and DR 5-104(A) taken together assert a noble fiduciary principle but leave largely untrammelled the lawyer's opportunity to engage in free trade with a client.

In the same vein we may consider the Code's treatment of the delicate matter of drafting a will containing donative provisions benefiting the draftsman. Ethical Consideration EC 5-5 says that "If a client voluntarily offers to make a gift to his lawyer, the lawyer may accept the gift, but before doing so, he

should urge that his client secure disinterested advice from an independent, competent person who is cognizant of all the circumstances". Even this Ethical Consideration does not quite say that the donor should obtain independent legal advice. It also does not say that the advice should be obtained before the donor provides for the gift, but only that the advice be obtained before the lawyer accepts the gift. How can that be done when the donor is now dead? In any case EC 5-5 is merely an ethical consideration. The Disciplinary Rules are silent on the subject of donative provisions benefiting the lawyer. That pregnant silence impliedly make it legitimate for a lawyer to draft a will providing him with a testamentary gift--a transaction the law recognizes as suspect and which most laymen probably regard as lawyer avarice in its purest form. But under the Disciplinary Rules such a transaction is entirely compatible with exercise of independent professional judgment on behalf of a client.

PUT IT IN WRITING

Written messages save time and avoid errors

MYERS FARMS
Rural Route 2
Cedar Rapids, Iowa

Date March 19, 1975

To

From

Dear Mr Lindall,

Bernie & I join in thanking you for your cooperation and generosity in getting the materials for the house. Especially the beautiful carpeting and drapes. We think it is wonderful. You'll never know how we appreciate it.

Hoping that sometime we can return the favors you have granted us.

Again we say Thank You.

Bernie & Lorell.

Office-Supreme Court, U.S.
FILED
JUL 16 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 80-2060

IN THE MATTER OF JOHN D. RANDALL, SR.,
Petitioner.

On Petition for a Writ of Certiorari
To the Supreme Court of Iowa

PETITIONER'S REPLY MEMORANDUM

JOHN D. RANDALL, SR.
330 1st Street SE
Cedar Rapids, Iowa 52401
PRO SE

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 80-2060

IN THE MATTER OF JOHN D. RANDALL, SR.,
Petitioner.

On Petition for a Writ of Certiorari
To the Supreme Court of Iowa

PETITIONER'S REPLY MEMORANDUM

John D. Randall, Sr., Pro Se Petitioner for a Writ of Certiorari from the action of the Panel of the Eighth Circuit disbarring Petitioner, for the reason that the record does show that there was any violation of Ethical Standards which would warrant disbarment from the Eighth Circuit Court of Appeals.

This Pro Se Petition for a Writ is now answered by Division III of Respondent's Brief In Opposition. The Respondent's attorneys are listed as Thomas J. Miller, Attorney General of Iowa; Mark E. Schantz, Solicitor of the State of Iowa; Lee Gaudineer, Hedo Zacherle, and Karen Shaff, attorneys of Des Moines, Iowa.

In addition to the attorneys listed above the other

attorneys in the Eighth Circuit were; James Reynolds, United States District Attorney for the Northern District of Iowa representing the United States District Court for the Northern District of Iowa and Roxanne Conlin United States District Attorney for the Southern District of Iowa representing the United States District Court for the Southern District of Iowa. There is no showing as to why these Counsel are not joining in the Response, only the statement of the Conclusion by Respondents present Counsel.

The Respondents seek to have this Court by the device of the denial of the Writ of Certiorari place the stamp of approval on the methods used by the Ethics Group of the Iowa State Bar Association and the Iowa Supreme Court. This was pointed out to the Eighth Circuit in Petitioner's Request that the Show Cause Order be Reheard En Banc. (Appendix in 80-2060, p. 100).

The Respondent further seeks to have this Court place its stamp of approval on the use of threats of Ethical sanctions in order to secure more favorable settlement in litigated matters.(Appendix 80-2060, p. 29-30)

The Respondents ignore the fact that Petitioner plead in his fifth defense the deceptions practiced by Mr. Gaudineer in not advising Respondent of the fact that there was a charge involving Conflict of Interest.(Appendix 80-

2060, p. 67-68)

The Respondent seeks to have the Writ of Certiorari denied. This would indicate that this Court is indifferent to tacticts used by Prosecutors for the Iowa Ethics Group to get their man.

The Justice Department and many of the Public Prosecutors are proclaiming their fight against "White Collar Crime". The record in this case discloses that the Petitioner was defrauded by Morningstar by not reporting any income received from the Hess 80. Mr. Morningstar admitted this. Morningstar gained $271,000.00 from the sale of this 80. He had had all of the expenses paid by Myers Farms, Inc., without the Petitioner's knowledge. The Petitioner believes that counting the payments made on behalf of Morningstar, of interest, insurance payments, seed, fertilizing, the cost of putting in the crops, and harvesting the crops, over the years Morningstar must have benefited by at least an additional $400,000.00. Thus his fraud benefited him by at least $700,000.00.(Exhibit J, p. 157, Appendix 80-2060) This was not mentioned by any Court. By denying the Writ, the Respondents are suggesting that this Court approves this white collar crime.

The argument by the attorneys for Respondents follows

their usual form. This was the method successfully used by Lee Gaudineer, Hedo Zacherle and Karen Shaff in No. 79-1416 in this Court, in the response (79-1416) the Petitioner stated, "Respondent, in its opposing brief in No. 79-1416, raises arguments based upon several erroneous assertions which convey false impressions and merit response".

In Respondent's Brief in opposition to Division III, the Respondents seek to obscure the point made by Petitioners that the rule with respect to "disciplining of attorneys shall be as prescribed in Rule 46 of the Federal Rules of Appellate Procedure". Rule 2(a) clearly provides that it is "cases and controversies" that may be heard by a Court or a Division thereof (Respondent's Appendix C, p.A21) This is not the Court as referred to in Rule 46 of the Federal Rules of Appellate Procedure.

While the argument of the Respondents, is clearly an appeal to prejudice, the Petitioner does deny that he in any way attacks any Court or a Judge thereof. Senior Judge Gibson is a highly qualified gentlemen. The fact that he was mislead by Counsel for Respondent does not cause Petitioner to condemn him. Judge Gibson certainly would not expect Counsel for the Ethics Group of Iowa to use the tactics which have been used to "get the Petitioner".

This is illustrated by the fact that Judge Gibson in commenting on the fact that Petitioner claimed that he was singled out for treatment because of his position mentioned alleged instances where the Ethics Group in Iowa had disciplined prominent Iowa lawyers. These various incidents were from the Brief of the Ethics Group in the Eighth Circuit. One of the instances mentioned was a professor at the University of Iowa Law School. This illustration was mentioned in the Brief of the Respondent before the Eighth Circuit. There was no citiation of the case and, thus, therefore this disciplinary sanction must have been from the secret files of the Ethics Committee.

The cases referred to by the Panel although not cited were committee on Professional Ethics vs. Bromwell(the Congressman) 221 NW 2d 777(Iowa 1974). Mr. Bromwell stipulated in writing that "He had willfully and knowingly failed to file United States and Iowa income tax returns for the calendar years 1965 through 1972, although required by law to file for each of those years". Mr. Bromwell was indicted in the United States District Court, plead guilty to one count and had been sentenced. Mr. Bromwell was suspended from practice and was given leave to apply for reinstatement in 18 months.(Disciplinary Rule 1-102)

Another case referred to by the Panel as involving a

former president of the Young Lawyers Section of the Iowa State Bar Association, your Petitioner believes was Committee on Professional Ethics vs. Darling 256 NW 2d 389(Iowa 1977). Mr. Darling willfully failed to file State income tax returns for the years 1969, 1971, 1972, 1974, and 1975. He also erroneously certified to the Iowa Client Security and Disciplinary Commission that the State returns had been duly filed. Mr. Darling was charged by a seperate County attorney's information for willful failure to file for each of those years and plead guilty to each of the charges. He was suspended. He was permitted to apply for reinstatement in 12 months.

The Respondent on page 15 of their Brief states, "In essence, the Petitioner is saying he did not understand that adherance to the principles of 'common honesty'***, prohibited his conduct".

Mr. Gaudineer and Mr. Zacherle who were of Counsel who prepared the Respondents Brief were one of a sub-committee of four who met at the office of Mr. Gamble, chairman of the Ethics Committee, October 12, 1977, and at that time participated in deceiving the Petitioner by not informing him that he was being charged with having a conflict of interest. Mr. Gaudineer and Mr. Zacherle also collaborated in drafting the Complaint against Petitioner

in two counts, this Complaint was sworn to by Mr. Gamble, the chairman of the Committee, October 18, 1977. One of the counts charged conflict of interest. Mr. Gaudineer visited the office of Petitioner early in November of 1977 and at that time did not inform the Petitioner that the Complaint had been drawn and sworn to and that he was being charged with conflict of interest.

Disciplinary Rules 1-102 states:

"A--A lawyer should not:

(4)Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation."

The Petitioner has pointed out the deceit which was practiced on him by the members of the subcommittee of the Ethics Committee before the Supreme Court of Iowa and the Federal Courts. He plead the deception of Mr. Gaudineer in his fifth defense to the Complaint(Appendix in Supreme Court of Iowa, p. 25). These charges have never been denied. Neither have any of these charges been mentioned in any of the opinions by any of the Judges.

The Petitioner was chairman of the Standing Committee of Professional Grievances of the American Bar Association in 1966. He would never have attempted to deceive or accused. It was his position and the position of the Committee, that an accused was entitled to be informed of all of the charges against him; and that he was presumed

innocent until proven guilty. We were all conscious of the charges made by the media against lawyers, but did not believe that an unfair or rigged hearing would enhance the standing of the Bar in the eyes of the public.

The Petitioner has set out the foregoing facts because he believes that the standards established by the Ethics Committee and Mr. Gaudineer and Mr. Zacherle relating to "Common honesty" as shown by their actions in his case is certainly not his standards of "common honesty".

Judge Gibson and the distinguished Panel of the Eighth Circuit were presented with a most difficult assignment. It was the responsibility of the Federal Court to make an independent de novo review of the record Sellings vs. Radford 243 US 46(1916), while the United States District Courts for the Northern and Southern Districts of Iowa had stated that each of the Courts had reviewed the record before the Supreme Court of Iowa, there were no facts stated which would reflect that such record had been examined by either of those Courts. Judge Gibson was furthe confronted with the contention of the Petitioner that he had never had his day in Court. The Petitioner requested that a Judge or Master from outside the State of Iowa having nothing to do with any of the proceedings be appointed for the purpose of conducting discovery.

If Petitioner were permitted to conduct discovery and the deceit and fraud which Petitioner charged were to be established, it would be most embarrasing to the United States District Courts for the Northern and Southern Districts of Iowa.

However, if an Opinion were written wherein the facts made by the Petitioner were considered and resolved, the Petitioner would not be able to have his claim reviewed by the United States Supreme Court.

The Opinion by the Panel of the Eighth Circuit used every fact claimed by the Respondent as though it were a verity. There was no mention of the deceit practiced by the Ethics Group. There was no mention of any controverting facts. One could not learn from the Opinion that there had been any facts produced by the Petitioner. The Opinion quotes as a fact from the testimony of Morningstar, a confessed perjurer, who the record showed had defrauded Petitioner. Large figures appear in the Opinion which are from the argument of the Ethics Group and are not supported by facts. There was no mention made of the fact that the Ethics Group had a greater burden than that of the Preponderance of evidence in Addington vs. Texas 411 US 718 60 L. Ed. 2d 323, 99 S. Ct. 1804(1979). There were no facts stated which the Court recognized as being proved

as required by the Addington case. It is clear that the proof in the case does not meet the standard for due process proof.

It is significant that in the notes to the Preamble and Preliminary Statement of the Code of Professional Responsibility there is a reference to Professional Responsibility: Report of Joint Conference 44 ABAJ 1159.(1958)

There is also in these notes a citation from Kingsland vs. Dorsey 338 US 318, 320, 94 L. Ed. 123, 126, 70 S. Ct. 123, 124-25(1949), reading:

> "An accused lawyer may expect that he will not be condemned out of a capricious self-righteousness or denied the essentials of a fair hearing."

A fair review of this record would certainly show that the Petitioner has been "condemned out of a capricious self-righteousness and was denied the essentials of a fair hearing".

Respectfully,

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